

6
Entered

JUN 23 1967

F 2302

San Francisco Law Library

436 CITY HALL


No. 186618

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

Nos. 20375, 20382.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS, M.
PHILIP DAVIS and CAROLYN L. DAVIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decisions of the
Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

FEB 10 1967

ARTHUR A. ARMSTRONG,
ARMSTRONG & BROWN,

458 South Spring Street,
Los Angeles, Calif. 90013,

Counsel for Petitioners.

FILED

MAR 28 1966

WM. B. LUCK, CLERK

TOPICAL INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	4
1. Facts found by the Tax Court	4
2. Price allocation procedure of Commissioner and used in judgment below	8
3. Comparison of Taxpayers' and tax court's allocation and valuation figures	12
4. Tax Court's valuation of fixed assets; ap- praisal evidence	13
Specification of errors relied upon	18
Summary of argument	18
Argument	19

I.

In the understanding of the Davises and in economic reality no gain was realized upon sale of the lemon crop for cash at point of acquisition; this was only a transitory step in their acquisition of the fixed orchard assets	19
---	----

II.

It was unrealistic for the Tax Court to conclude from opinion testimony that the value of fixed assets exceeded price paid therefor and use this as a basis for ascertaining profit in a simultaneous sale of quick assets	21
--	----

III.

Page

In a purchase of current and fixed assets for a lump-sum, first allocation of price generally is made to quick assets; invariably so if they are promptly converted to cash	24
A. The Commissioner has consistently applied this principle by making first allocation of price to a crop purchased with the land	24
B. The Commissioner and courts have generally agreed with the normal accounting practice of allocating the first portion of a lump-sum price to current assets bought with fixed assets. Such first allocation is always made where the asset is immediately converted and equivalent to cash	26
Conclusion	30

TABLE OF AUTHORITIES CITED

Cases	Page
Alper, Henry S., 21 T.C.M. 185	27
American Fork and Hoe Company, The, 2 T.C.M. 842	26
Apex Brewing Co., Inc., 40 B.T.A. 1110 acq. 1940-1 C.B.I.	27
Bessemer Limestone and Cement Company, The, 15 T.C.M. 1277	30
Blum, Nathan, 5 T.C. 702	28, 29
F & D Rentals, Inc., 44 T.C. No. 32, C.C.H. Dec. 27,424	28
Farmers Cotton Oil Company, 27 B.T.A. 105, non- acq. XII-1 C.B. 16	27
Fox & Hounds, Inc., 21 T.C.M. 1216	27
George Haiss Manufacturing Co., 16 T.C.M. 1106	20
Graves, L. M., 11 T.C.M. 467	29
Herbert, James K., 62-1 U.S.T.C. 9177	27
Hillside National Bank, The, 35 T.C. 879	21
Kanawha Gas & Utilities Co., 214 F. 2d 685, 45 A.F.T.R. 1805	20
Kimbell-Diamond Milling Co., 14 T.C. 74 aff'd. 187 F. 2d 718 cert. den. 342 U.S. 827	20
McGregor, Harlan E., 14 T.C.M. 897	27
N.W. Ayer & Son, Inc., 17 T.C. 631 acq. 1952-1 C.B. 1	21
Philadelphia Steel & Iron Corporation, 23 T.C.M. 558, aff'd 344 F. 2d 964, 65-1 U.S.T.C. 9308	26, 27

	Page
Prairie Oil & Gas Co. v. Motter, 66 F. 2d 309, 12 A.F.T.R. 996	20
Suter, James F., Estate of, 29 T.C. 244 acq. 1958-2 C.B. 8	27
T. H. Symington & Son, Inc., 35 B.T.A. 711 ..28,	29
Tube Bar, Inc., 15 T.C. 922	21
United States v. Frank Mattison, 273 F. 2d 13, 59-2 U.S.T.C. 9768	20
United States v. M.O.J. Corporation, 274 F. 2d 713, 60-1 U.S.T.C. 9209	20
Watson v. Commissioner, 345 U.S. 544, 43 A.F.T.R. 621	21
Zemmer, Richard J., 22 T.C.M. 638	27

Regulations

Treasury Regulation 1.61-6(a)	24
Treasury Regulation 1.167(a)-5	24
Treasury Regulation 1.334-1(c)(4)(v)(b)(1)	24
Treasury Regulation 1.334-1(c)(4)(viii)	24

Statutes

Internal Revenue Code of 1939, Sec. 111	3
Internal Revenue Code of 1939, Sec. 113	3
Internal Revenue Code of 1954, Sec. 6213	2
Internal Revenue Code of 1954, Sec. 7482	2

Nos. 20375, 20382.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS, M.
PHILIP DAVIS and CAROLYN L. DAVIS,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decisions of the
Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The memorandum findings of fact and opinion of the Tax Court [R. pp. 28-57] was filed February 16, 1965 and is designated T. C. Memo 1965-30. It is unofficially reported at 24 T.C.M. 157.

Jurisdiction.

The petition for review [R. pp. 78-85] involves federal income taxes for the year 1953. Although it also referred to the year 1954, review of that year has been eliminated by stipulation. On June 9, 1961 the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency in the form of Exhibit "A" to

the petition in Tax Court Docket No. 94044 [R. pp. 10-19] asserting deficiencies as follows for 1953: against W. Thomas Davis and Elizabeth Lloyd Davis, \$76,-534.98; against M. Philip Davis and Carolyn L. Davis, \$84,298.86. [R. p. 28.] Within 90 days thereafter, and on August 30, 1961, taxpayers filed petitions with the Tax Court for redetermination of those deficiencies under Section 6213 of the Internal Revenue Code of 1954; the errors, issues and facts were essentially the same in both petitions, one of which, that in Tax Court Docket No. 94044, is presented at R. pages 1-8. The decisions of the Tax Court were entered on May 20, 1965. [R. pp. 67-77.] These consolidated cases are brought to this Court by petition for review filed August 12, 1965. [R. pp. 78-85.] Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

Question Presented.

In order to acquire the Del Norte orchard, the Davis brothers obtained options to buy the stock of the corporate owner. Of the total stock cost of \$889,615, \$500,-000 was needed in cash; the Davises did not have it. However, they pre-arranged sales of corporate quick assets so that at a closing of escrows the \$500,000 was provided by corporate cash and cash from such sales concluded simultaneously with the stock purchase; the lemon crop on the trees, sold in this fashion, brought \$212,700 in cash to the deal.

After first allocation of \$440,778 of the stock cost to cash and quick assets converted to and used as cash, the cost of the fixed orchard assets was \$448,837. Relying on appraisal opinion rendered ten years later, the Tax Court decided that the fixed assets were worth more

than that when acquired. The Court reallocated cost on a percentage basis between the lemon crop and the fixed assets and concluded that a profit of \$76,572 was realized from the cashing of the lemon crop at point of purchase. Was this conclusion erroneous?

Statutes Involved.

Internal Revenue Code of 1939:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

[Exceptions not pertinent]

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

[Adjustments not pertinent]

Statement.

1. Facts Found by the Tax Court.

Toward the end of 1952 Tom Davis began negotiations on behalf of himself and his brother Phil to acquire the assets of Del Norte Citrus Co., a corporation, herein called "Del Norte." These were conducted with the corporate stockholders, including its president, and resulted in the acquisition by Tophil Farms, Inc., a corporation wholly owned by the Davises, of options to buy all of the stock of Del Norte. The operating properties of Del Norte consisted of 428.35 acres of land in Ventura County, California, 354.26 acres of which were planted with lemon trees and improved with irrigation lines, tanks, wells, roads, various buildings and wind machines useful in operating a lemon orchard. [R. p. 30.]

After obtaining the options in May 1953, Tom Davis went to Europe, returning July 4, 1953. He thereupon gave his attention to raising the \$500,000 of cash needed to complete the purchase, which sum the Davises did not have available. He planned to use cash which Del Norte had in the bank and sell certain assets, principally packinghouse revolving fund certificates and the lemon crop set on the trees in various stages of maturity. The Davises intended to keep and operate the fixed assets constituting the lemon orchard. [R. pp. 30-31.]

Tom knew when he negotiated for the Del Norte stock that lemons were in short supply. Beginning July

4, 1953 he contacted representatives of a number of companies engaged in processing lemon juice concentrates, to inquire whether they were interested in buying the Del Norte crop. Six or seven individuals expressed an interest; a number of processing plants did not have sufficient lemons to meet their juice commitments and were anxious to buy the entire crop on the trees. Tom was asking \$2.50 per box for the lemons on the trees and had several offers of \$2.00 per box. He concentrated his negotiations with Eadington and Twombly, officers of Golden Citrus Juices, Inc. (herein called "Golden Citrus"), which was partly owned by Minute Maid Corporation, and had a contract with Minute Maid to supply its needs for lemon juice and products. [R. pp. 30-33.]

In late August or early September 1953 Tom verbally agreed with Eadington and Twombly to transfer the Del Norte lemon crop to Golden Citrus, as soon as the Davises acquired it, for \$2.00 a box of the estimated harvest from the crop then set on the trees from pea size to mature fruit. They accepted an estimate that 118,850 field boxes would be picked from this crop over the next nine months. Consequently they arrived at an oral understanding that Golden Citrus would buy the crop in its then condition on the trees for \$237,700 cash and would take all risks of loss or damage to the crop. The board of directors and principal stockholders of Golden Citrus approved these terms. [R. pp. 33-34.]

Accordingly, the written contract of September 12, 1953 between the Davises and Golden Citrus provided that as soon as the Davises acquired title to the Del Norte orchard they would sell the lemon crop to Golden Citrus for \$237,700 cash payable through escrow. Pursuant to this contract Golden Citrus placed the \$237,700 in a lemon crop escrow on September 17, 1953. At about the same time the Davises opened three other escrows. The four escrows were so arranged that the following was accomplished when they were closed on or about September 22, 1953: The Davises, who had received from Tophil Farms, Inc. an assignment of the options to buy the Del Norte stock, proceeded to exercise those options; Del Norte was dissolved and distributed to the Davises its assets, including cash just received by it from the sale of revolving fund certificates; a bill of sale from the Davises covering the lemon crop was delivered to Golden Citrus; the corporate cash and the \$237,700 of cash from the lemon crop escrow was used in paying for the Del Norte stock. [R. pp. 35-39.]

There was attached to the 1953 tax return of each of the Davises a statement reflecting and allocating the total cost of the Del Norte stock in a manner which may be summarized as follows:

Cost:

Cash paid stockholders	\$472,392.00
Notes to stockholders and others	394,835.67
Expenses of purchase and payables	<u>22,387.60</u>
Total cost	\$889,615.27

Allocated as follows:

Cash [largely derived from the sale of revolving fund certificates]	\$171,632.00
Accounts receivable	14,798.06
Inventory of lemons in warehouse	32,764.43
Oil inventory	6,031.26
Lemons on the trees	237,700.00
Deposit	900.00
Less adjustment for liability	<u>(2,083.10)</u>
Subtotal	\$461,742.65
Equipment promptly sold	4,035.30
Subtotal	465,777.95
Land, improvements, buildings, trees and equipment [fixed orchard assets]	<u>423,837.32</u>
Total allocated	\$889,615.27

The statement explained that the prompt disposition of certain of the foregoing assets for cash was considered to call for first allocation of cost to them and to other quick assets, such as cash and accounts receivable [the total of these being \$465,777.95]; and that the balance [of \$423,837.32] was allocated among the other assets largely in accordance with property tax assessments. [R. pp. 41-44.]

The notice of deficiency to each of the Davises increased his 1953 taxable income by \$101,429.50, stating that this figure:

“* * * represents a reduction in the cost of certain lemons sold from \$237,700.00 to \$34,841.00 or by \$202,850.00 of which your 50% distributable share is as shown by this adjustment. It is held that the fair market value of the growing lemons, including matured and immatured fruit, received in liquidation of Del Norte Citrus Company was overstated by the tenants in common.” [R. p. 44.]

The lemon crop sale contract contained a normal provision requiring the Davises as sellers to cultivate and care for the orchard while the crop was maturing, which provision had a value of \$25,000. [R. pp. 37, 38, 40.] The fair market value of the lemon crop when acquired by the Davises was \$212,700 [R. p. 41]; in other words, was the cash price of \$237,700 simultaneously paid by Golden Citrus, less the \$25,000 allocated to the provision for orchard care.¹

2. Price Allocation Procedure of Commissioner and Used in Judgment Below.

In the administrative stages of this case, including the deficiency notice, the Commissioner followed the

¹Provisions in the lemon crop sale contract whereby the Davises would share in profit made by Golden Citrus on the crop and, in return, guaranteed the pick, were inserted after the cash price had been agreed to; these added provisions offset each other, and in any event never came into play. [R. pp. 34-35, 39-40.]

taxpayers' method² of allocating the total cost of Del Norte assets in two steps: the first portion to quick assets at cash or face value; the balance among fixed orchard assets pro rata according to assessed values. This is evident from the following.

The statutory deficiency notice and the Revenue Agent's report proposed the same deficiency, to the penny. See, for example, the notice to Tom and Elizabeth Davis [R. pp. 11-14] and the Revenue Agent's report to them [Ex. 31, p. 1],³ each proposing a deficiency of \$76,534.98 for 1953. The Commissioner's method of readjusting the cost of the lemon crop and other assets appears on pages 4 and 17 of Exhibit 31. On page 4 he concluded that the crop had a value of \$34,841, which was \$2.35 a box for the 14,826 field boxes estimated to be ready for picking at date of sale; He reduced the crop value of \$237,700, which the taxpayers had claimed as crop cost, to this figure of \$34,841, thereby producing an adjustment of \$202,859. On page 17 he added this adjustment to a figure of \$433,903.88 thereby arriving at \$636,762.88 which he allocated percentage-wise to fixed assets; the \$433,903.88 consists of the taxpayers' fixed asset figure of \$423,837.32 increased by two items included in taxpayers' list

²With a minor exception for oil inventory and a small amount of resold equipment, which will be explained.

³This Exhibit from the Tax Court record, along with Exhibits 28 and F, which were designated for reproduction but not reproduced in the transcript here, have been accepted by this Court for consideration in original form. Order of February 21, 1966, entered upon stipulation of the parties.

of quick assets, namely, fuel oil, \$6,031.26, and miscellaneous equipment resold promptly after acquisition, \$4,035.30. In other words, although the Commissioner treated the crop as worth only the resale value of the small portion ready for immediate harvest, he included it among the quick assets receiving first allocation of cost at full value. He did not include it among fixed assets to which the balance of cost was allocated among values on a percentage basis.

It was stipulated by the Commissioner at the trial that the amount by which the basis of the lemon crop was reduced below \$237,700 should be allocated among the fixed orchard assets according to the assessed value proration used by petitioners in their returns. [R. p. 45.] It will be apparent from the computation for entry of judgment that this was done and that oil inventory and resold equipment were again treated as quick assets, where taxpayers had included them originally. If any one of the figures allocated to fixed assets in the return [R. p. 43] is divided by the total cost of fixed assets (\$423,837.32), it will be found that the percentage is approximately the same as the percentage for that asset in the judgment computation. [R. pp. 65, 75.] It will also be noted by re-arranging the figures in the judgment computation [R. pp. 65, 75] and comparing them with the return allocation figures [R. pp. 42-43] that the judgment figures have been arrived at as follows:

First step: allocation of first portion of cost to quick assets at full face or cash value:

Cash [including cash derived from con- temporaneous sale of revolving fund certificates]	\$171,632.00
Accounts receivable	14,798.06
Inventory of lemons in warehouse	32,764.43
Inventory of oil	6,031.26
Deposit on trees	900.00
Subtotal	226,125.75
Less Liability	(2,083.10)
Subtotal	224,042.65
Equipment resold	4,035.30
Total quick assets receiving first cost allocation	\$228,077.95

Second step: allocation of balance of cost among lemon crop and fixed assets:

Total cost	\$889,615.27
Less quick asset portion above	(228,077.95)
Balance	\$661,537.32

Allocated according to relative values found by Tax Court [see Op. below, R. p. 56]:⁴

	Value	% of Total Value	
Crop	\$ 212,700	20.58%	\$136,128.00
Fixed assets	823,300	79.42%	525,409.32
Total	\$1,036,000	100.00%	\$661,537.32

⁴The Tax Court arrived at its allocation by taking the cost of \$667,537.32 as a percentage (64%) of assumed value of \$1,036,000, and then applying that percentage to the individual

3. Comparison of Taxpayers' and Tax Court's Allocation and Valuation Figures.

For clarity in understanding the effect of the Tax Court's decision, we here reproduce in parallel columns summary figures derived from headings 1 and 2 of this Statement :

	<u>Taxpayers' Figures</u>	<u>Difference</u>	<u>Tax Court's Figures</u>
Total cost	<u>\$889,615.27</u>	—0—	<u>\$889,615.27</u>
First allocation to quick assets :			
Lemon crop (\$237,700)			
Adjust- ment for orchard care <u>25,000</u>	(212,700.00)	\$212,700.00	—0—
Other quick assets	<u>(228,077.95)</u>	<u>—0—</u>	<u>(228,077.95)</u>
Subtotal	<u>(440,777.95)</u>	<u>212,700.00</u>	<u>(228,077.95)</u>
Remainder allocation to fixed assets	<u>448,837.32</u>	<u>212,700.00</u>	<u>661,537.32*</u>
Value of fixed assets (excluding lemon crop)	<u>448,837.32</u>	<u>374,462.68</u>	<u>823,300.00</u>

*Including lemon crop.

What the Tax Court has done in effect is to transfer part of the foregoing theoretical profit of \$374,462.68 to the lemon crop. The figures are as follows :

	<u>Value</u>	<u>Allocated Cost</u>	<u>Theoretical Profit</u>
Lemon crop	\$ 212,700	\$136,128.00	\$ 76,572.00
Fixed assets	<u>823,300</u>	<u>526,409.32</u>	<u>297,890.68</u>
Total	<u>\$1,036,000</u>	<u>\$661,537.32</u>	<u>\$374,462.68</u>

values, but the result is the same as that arrived at above. Because the 64% used by the Tax Court was a rounded figure, there is a small lack of correspondence between the percentages used above and the value figures to the left of them.

**4. Tax Court's Valuation of Fixed Assets;
Appraisal Evidence.**

It is the taxpayers' major position, concurred in by the Commissioner through the point of issuing his statutory notice, that the lemon crop was a cash equivalent entitled to first cost allocation along with the other quick assets. We believe that the Tax Court has committed manifest error of law in treating it otherwise. If this Court agrees, the Tax Court's valuation of the fixed assets is immaterial.

However, we believe that taxpayers' secondary point concerning valuation of fixed assets also deserves this Court's attention. From the comparative figures under heading 3 of this Statement, it will be apparent that the only basis which the Tax Court had for concluding that taxpayers made a profit upon immediate resale of the lemon crop, was its finding that the fixed assets had a point-of-purchase value in excess of their cost. Since the orchard has never been sold by taxpayers, this finding had to be based upon opinion testimony of the appraisal witnesses. [R. pp. 41, 55-56.] Therefore, we will now refer to the appraisal report and testimony of Hoffman, the Commissioner's witness, and the appraisal report of Taschner, petitioners' witness. [Exs. F and 28; 2R. pp. 236-296.]⁵

Between May 13 and May 19, 1964 Hoffman undertook to ascertain the fair market value of the fixed assets of the Del Norte orchard (land, improvements, buildings, trees and windbreaks) as of September 22,

⁵The reference "2R." is to the second volume of the Transcript on appeal. Exhibits F and 28 have been accepted by this Court for consideration in original form. See footnote (3) above. The appraisal report of Taschner was stipulated into the record below without testimony.

1953, a date $10\frac{1}{2}$ years earlier. His method was to theorize from background information, such as the assessor's records; he conceded that his inspection of the property was cursory, saying that a current inspection would have little significance. He relied upon seven so-called "comparable" sales, of which five involved comparatively small parcels of 10, 30, 52, 63, and 69 acres, respectively, one condemnation sale of 109 acres was conceded to have little comparative value, and one sale (#7) of 86 acres occurred more than three years after the valuation date. [2R. pp. 246-286; Ex. F.]

He carefully specified that he took no account of the transaction involved here, by which taxpayers on the date of his valuation purchased the 428 acre lemon orchard he was appraising; and indicated that it would have made no difference to his valuation if he had known the price paid here. [2R. pp. 246, 284-286, 292-294.] He conceded that at the valuation date the subject property was still of only agricultural value, that subdivision and conversion to higher use was just starting in the general area, that small parcels were selling at a higher price per acre than large parcels, and that larger ranches may have stayed on the market a considerable time before being sold. [2R. pp. 253-256.]

Comparable #7 relied upon by Hoffman adjoined the Del Norte orchard and involved 86 acres of lemons, walnuts and some row crops with a good home on it. It sold on December 10, 1956 in active bidding, at a total price that averaged \$2,180 per acre including improve-

ments. [2R. pp. 266-267, Ex. F, Supporting Data, Sale #7.] Hoffman followed his comments about that comparable with his statement that he valued the 428 Del Norte acres at \$2,000 an acre, including improvements. [2R. p. 267.] He failed to explain why the 428-acre orchard was worth \$2,000 an acre in September 1953 when the much smaller 86-acre orchard was worth only \$2,180 an acre in December 1956, after three years of the trend toward subdivision and higher use to which he had referred.

Taschner, taxpayers' appraisal witness, set out upon a different course, namely, that of determining "the relative fair market values of the component parts of, plus certain chattels used upon" the Del Norte orchard as of September 21, 1953,⁶ and obviously did a careful job of inspecting the property itself as well as available records related in time to the valuation date. [Ex. 28, pp. 1-11.] His experience is impressive; since 1950 he has previously appraised over 2,000 farm properties including several hundred lemon groves. [Ex. 28, p. 13.] By comparison, Hoffman appears previously to have appraised one lemon grove. [2R. pp. 239-240.] Taschner's first three comparables are parcels of a size and price

⁶Taxpayers' counsel retained Taschner to make such an appraisal for the purpose of determining relative values of fixed orchard assets, as a basis for allocating among them the portion of the total cost remaining after first allocation to quick assets including the lemon crop. Concession of Commissioner's counsel, at opening of trial, that the percentage allocations to fixed assets used in the return could also be used in this case, made such an appraisal unnecessary. This concession was not foretold by pre-trial discussion between counsel and astonished taxpayers' counsel. See opening remarks of counsel. [2R. pp. 8-26.]

per acre that correspond with the size of the Del Norte orchard and the price per acre that taxpayers paid for it. [Ex. 28, pp. 14-16.] It should be noted that the \$448,837.32 paid by taxpayers for the 428 acres of the Del Norte orchard fixed assets (after allocating the first portion of total cost to quick assets) amounts to an average of \$1,049.00 per acre including improvements.⁷

Taschner's report concludes with the following significant statement [Ex. 28, pp. 11-12]:

"The total of relative fair market values and component parts arrived at above does not represent my opinion of the fair market value of the lemon orchard which is made up of those parts. A property of this size in the year 1953 was one that would not be readily marketable because the number of available buyers was limited in view of size. If a single unit will sell at a certain price, it will not necessarily follow that the multiple of those units would sell at the same multiple of that price; the greater the multiple the greater the discount.

"I am advised that the Del Norte Citrus Company Orchard on September 21, 1953 was owned by a corporation containing other assets, the stock of which was purchased by Messrs. Tom and Phil Davis on September 22, 1953. I am advised that after deducting from the price paid for the stock, the cash and cash value of assets immediately sold, the remaining portion of price allocable to the orchard components that I have appraised was less than 50% of my total appraisal value of the com-

⁷It is not clear where the Commissioner's counsel got his figure of \$409 an acre about which he questioned Hoffman [2R. 284-285] but he was apparently referring to some calculation he had made with respect to bare land.

ponents. A somewhat similar transaction occurred in 1952, as set forth in Comparable 1, in which the price attributable to a lemon orchard property of almost identical size to the one in question would appear to have been quite low.

"In my opinion, the fair market value of the orchard made up of the components that I have valued would be a fraction of the total of my values for the components. Such fair market value would depend upon what a willing buyer would pay to a willing seller for the entire 428 acres, comprising all of the aforesaid components as a result of negotiation in which neither party was acting under compulsion or duress.

"Even though the property was acquired by purchasing stock of a corporation and dissolving the corporation, it is reasonable to presume that the value of all of the assets of the corporation was known both to the buyers and sellers of the stock. If it were true, as I have been advised, that the assets of the corporation consisted essentially of the lemon orchard plus cash and assets promptly converted into cash, then in my opinion the best evidence of the fair market value of the orchard is the price paid for the stock, less the amount of such cash and cash to which assets were promptly converted."

The Tax Court's determination of fixed asset value of \$823,300 was evidently in reliance upon its subordinate conclusion that "There is no substantial disagreement between respondent's and petitioners' expert witnesses with respect to the valuation" of those assets, except for trees. [R. p. 55.] Apparently the Tax Court did not carefully read Taschner's report.

Specification of Errors Relied Upon.

1. The Tax Court erred in treating the lemon crop sold for cash at point of acquisition as a fixed asset entitled only to percentage allocation of remaining cost, instead of including it with the other quick assets entitled to first allocation of cost.

2. The Tax Court erred: in concluding, on the basis of an appraisal opinion given ten years after the event, that retained fixed assets were worth more at the point of purchase than the price paid for them; and in assigning part of the consequent theoretical profit to the cashing out of the lemon crop that occurred contemporaneously with the purchase.

Summary of Argument.

In the interest of brevity, the Court is respectfully referred to the headings under "Argument" in the Index as a summary of petitioners' argument.

ARGUMENT.

I.

In the Understanding of the Davises and in Economic Reality No Gain Was Realized Upon Sale of the Lemon Crop for Cash at Point of Acquisition; This Was Only a Transitory Step in Their Acquisition of the Fixed Orchard Assets.

The Davises wanted the Del Norte orchard. In order to acquire it they obtained options to buy the stock of the corporation that owned it. The total cost of acquiring the stock would be \$889,615. Of this, about \$500,000 had to be paid in cash, and they didn't have the money. But the corporation had quick assets that could be turned into cash, and the Davises made advance arrangements to do so.

Their plan worked well. In a series of transactions accomplished within a few days of September 22, 1953 the Davises exercised their stock options, had the corporation sell revolving fund certificates for cash, dissolved the corporation and took distribution of its assets, sold the lemon crop on the trees for cash, and used the cash thus raised to pay for the corporate stock. They had previously contracted to sell the lemon crop as soon as they should acquire it; the cash price for the crop was in escrow on September 17, 1953, and was transferred into the stock purchase escrow on or about September 22, 1953.

The Davises considered that they had bought the fixed assets of the orchard for the total cost of the stock less the cash raised by the pre-closing arrangements and used at the closing. [2R. pp. 311-312, 344-345.] And that was the economic reality. The Davises

did not have the money to buy the Del Norte stock and thereby acquire the orchard. What they could and did do was arrange in advance for conversion of corporate quick assets to cash and funnel that cash through to the corporate stockholders at point of purchase. This left the Davises with a price of \$448,837 to pay for the orchard. Since \$394,836 of that price was deferred, being represented by notes to stockholders and others, they were able to manage the purchase.

In the view of the taxpayers and the Tax Court [R. pp. 43, 47] this was a so-called *Kimbell-Diamond* acquisition, treated in the tax law as a purchase of corporate assets in substance even though accomplished in form by purchase of stock and dissolution of the corporation. In the theory of this line of tax cases, the buyer's acquisition and ownership of the corporation is disregarded as a transitory step. *Kimbell-Diamond Milling Co.*, 14 T.C. 74 (1950), *aff'd.* 187 F. 2d 718 (C.A.5) *cert. den.* 342 U.S. 827; *United States v. Frank Matison*, 273 F. 2d 13 (C.A. 9, 1959), 59-2 U.S.T.C. 9768; *United States v. M.O.J. Corporation*, 274 F. 2d 713 (C.A. 5, 1960), 60-1 U.S.T.C. 9209.

In some instances, the buyer is able to acquire the wanted fixed assets of a corporation and let its shareholders take distribution of the unwanted quick assets. *Cf. Prairie Oil & Gas Co. v. Motter*, 66 F. 2d 309 (C.A. 10, 1933), 12 A.F.T.R. 996; *Kanawha Gas & Utilities Co.*, 214 F. 2d 685 (C.A. 5, 1954), 45 A.F.T.R. 1805; *George Haiss Manufacturing Co.*, 16 T.C.M. 1106 (1957). But if, as in the present case, it is inconvenient or impossible to break apart the corporate assets as part of the contract with the selling shareholders, the buyer must proceed as the Davises did here.

that is, arrange for conversion of the unwanted quick assets to cash at point of purchase and channel the cash to the selling stockholders. In such circumstances the buyer's handling of the cash-out problem, like his dissolution of the acquired corporation, is but a transitory step in his acquisition of the wanted fixed assets.

On the other side of the coin, the Revenue Service, with the support of the courts, is firm in refusing loss deduction to a buyer who immediately cashes out one of the purchased assets of a bundle; in such circumstances, the cash-out results not in loss but in an adjustment of basis. *Tube Bar, Inc.*, 15 T.C. 922 (1950). Cf. *N.W. Ayer & Son, Inc.*, 17 T.C. 631 (1951) *acq.* 1952-1 C.B. 1; *The Hillside National Bank*, 35 T.C. 879 (1961).

II.

It Was Unrealistic for the Tax Court to Conclude From Opinion Testimony That the Value of Fixed Assets Exceeded Price Paid Therefor and Use This as a Basis for Ascertaining Profit in a Simultaneous Sale of Quick Assets.

Although a growing crop may not be inventory in the strict sense, it is the produce of the land or orchard and, like inventory, is normally converted to cash within a year or sooner. The Supreme Court has held that a growing citrus fruit crop is property held for sale to customers in the ordinary course of the business both of the grove owner who sells the orchard and of the grove owner who buys it. *Watson v. Commissioner*, 345 U.S. 544, 43 A.F.T.R. 621 (1953). This is by contrast to the orchard land and trees which, after six months holding, become equivalent to a capital asset for gain purposes.

I.R.C. Sec. 1231. At the point of its sale for cash a growing crop certainly may be termed a "quick asset" and a cash equivalent.

The fixed assets of the Del Norte Orchard were acquired by the Davises to hold and operate, and they have been held and operated. Gain on their sale has never been demonstrated; whereas inflationary trends since 1953 may indicate gain, it was only speculative on September 22, 1953. On the other hand, the quick asset, the lemon crop, was not acquired to hold; was readily convertible and immediately converted to cash, and was merely an element in a plan to funnel available cash to the sellers of the asset bundle. It is obvious that at September 22, 1953 the lemon crop was worth what it brought in immediate sale. But it is far from obvious that the fixed assets were then worth any more than the \$448,837 that was then paid for them. Only by assuming that the fixed assets were then worth more can any profit be found in the transactions of September 22, 1953 or attributed to the lemon crop.

The Tax Court was quite unrealistic in relying upon opinion testimony of an appraiser viewing the fixed assets in 1964, ten and a half years after they were bought, for its conclusion that on September 22, 1953 they were worth \$823,300, which was \$374,463 more than the price paid for them in the arms-length purchase transaction of that date; and even more unrealistic in transferring part of that theoretical profit to the point-of-purchase sale of the lemon crop, a quick asset.

Furthermore, the Tax Court patently misinterpreted the opinion testimony upon which it relied. It based its \$823,300 valuation of fixed assets on its conclusion that the two appraisers were largely in agreement as to

values [R. p. 55]; whereas even a cursory reading of Taschner's report [Ex. 28] reveals that his individual valuation figures for elements, such as land, trees, buildings and improvements, were relative and not indicative of the total value of the fixed asset group. Taschner's opinion was that fair market value of the fixed orchard assets as a whole was best demonstrated by the price paid for those assets, as derived from the price paid for the corporate stock less the corporate cash and cash to which corporate assets were promptly converted. [Ex. 28, p. 12.]

The Tax Court's substitution of a theoretical figure of \$823,300 for actual cost, as the 1953 value of the fixed assets, is thus impeached by its obvious misinterpretation of one of the two appraisals upon which it relied. If further impeachment were needed, we believe it appears in the other appraisal, made by Hoffman, analyzed under heading 4 of our Statement. We will not repeat that analysis here beyond noting that Hoffman's "comparables" were not parallel in size; and that in ignoring this purchase transaction he was rejecting the best evidence of the value of the property purchased.

We submit that the Tax Court committed manifest error in finding a theoretical value of \$823,300 for the fixed assets of the Del Norte orchard on September 22, 1953 when they were bought for \$448,837; and in attributing part of the theoretical profit of \$347,463 to the lemon crop acquired September 22, 1953 and sold that day for \$212,700. We believe this was an error of law. However any fact finding involved was clearly erroneous.

III.

In a Purchase of Current and Fixed Assets for a Lump-Sum, First Allocation of Price Generally Is Made to Quick Assets; Invariably so if They Are Promptly Converted to Cash.

A. The Commissioner Has Consistently Applied This Principle by Making First Allocation of Price to a Crop Purchased With the Land.

In 1920 the Commissioner issued O.D. 714, 3 C.B. 49, reading as follows:

“A purchased for a certain price land together with crops growing thereon. The basis for determining gain or loss upon a subsequent sale of the crops is the difference between the cost, or if no part of the purchase price was assigned to the crops, the fair market value thereof at the time of purchase, and the selling price less cost of harvesting and marketing.”

In not requiring a pro rata allocation between value of land and crop, but accepting crop value as its basis, this ruling is calling for first allocation of price to the crop. It has never been revoked or altered.⁸ Though it was cited to the Tax Court, the Court ignored it.

This ruling applies specifically to this case and requires that the \$212,700, found as fair market value

⁸It was cited with approval in I.T. 3815, 1946-2 C.B. 30. There are no regulations on the subject of first allocation of lump-sum price to a crop or other quick asset. Neither Reg. 1.61-6(a) nor Reg. 1.167(a)-5 refers to an allocation where current assets are included. Regs. 1.334-1(c)(4)(v)(b)(1) and (c)(4)(viii) call for first allocation to “cash and its equivalent” in the situation where one corporation buys at least 80% of the stock of another and dissolves it within two years.

of the lemon crop at acquisition, shall be treated as basis in determining gain on its sale. The effect, of course, is to eliminate gain, except for the \$25,000 (of the \$237,700) which was concededly paid for the Davises' obligation to care for the orchard while the crop was maturing.

As noted under heading 2 of our Statement, the Commissioner did not assert his deficiency on the ground that the lemon crop should receive percentage allocation like a fixed asset; he gave it first allocation along with the other quick assets. By singling out the crop for fixed asset allocation the Tax Court has anomalously distinguished one quick asset worth \$212,700 in cash at point of purchase from others worth \$228,078 in cash at point of purchase. The latter have continued to receive first allocation of cost even though some of them (receivables and lemons in the warehouse) obviously were converted into cash after the purchase date when the lemon crop was sold for cash.

Repudiation of O.D. 714 would cause consternation in farm circles. It has certainly not been the practice of a farmer who buys land or an orchard with a growing crop to have both the crop and the land appraised for the purpose of determining how much cost to allocate to the crop.⁹

⁹Cf. testimony of Herron, taxpayers' C.P.A. [2R. 572.]

B. The Commissioner and Courts Have Generally Agreed With the Normal Accounting Practice of Allocating the First Portion of a Lump-Sum Price to Current Assets Bought With Fixed Assets. Such First Allocation Is Always Made Where the Asset Is Immediately Converted and Equivalent to Cash.

Where fixed and current assets are bought in a bundle, as where a going business is purchased, it is normal accounting practice to allocate the first portion of cost to current assets, and then pro rate the remainder among fixed assets according to relative values. In the usual case any other method would work distortion. If a business is bought to operate it would be strange indeed to tax the buyer on an artificial profit in the purchased inventory and receivables arrived at by appraising the plant and real estate at a figure higher than the remainder of cost available for them, and re-allocating total cost on a percentage basis among the inventory and receivables at cashable value and the plant and real estate at such appraised value. The point is that the inventory and receivables will be promptly cashed out in normal business operations. The plant and real estate will not be sold, but will be used to create and sell more inventory and will have a value to the buyer chiefly determined by whether and to what degree such operations prove to be profitable.

This principle has generally been recognized by the Commissioner and the Courts. In the great majority of cases first allocation of lump-sum price to quick assets of a purchased business or farm has not been disturbed.

The American Fork and Hoe Company, 2 T.C.M. 842 (1943); *Philadelphia Steel & Iron Corporation*,

23 T.C.M. 558 (1964), *aff'd*, 344 F.2d 964, 65-1 U.S.T.C. 9308; *Estate of James F. Suter*, 29 T.C. 244 (1957), *acq.* 1958-2 C.B. 8; *Richard J. Zemmer*, 22 T.C.M. 638 (1963); *Fox & Hounds, Inc.*, 21 T.C.M. 1216 (1962); *James K. Herbert*, 62-1 U.S.T.C. 9177 (Dist. Ct. Cal. 11, 14, 61); *Henry S. Alper*, 21 T.C.M. 185 (1962) (issue concerning Middlebelt Livonia); *Farmers Cotton Oil Company*, 27 B.T.A. 105 (1932), *non-acq. on another point* XII-1 C.B. 16.

In the *Herbert* case \$45,000 of the \$158,800 paid as price for the ranch represented a first allocation to the growing crop agreed to by both parties. The argument concerned the allocation of the remaining \$113,800 among fixed assets.

In *Apex Brewing Co., Inc.*, 40 B.T.A. 1110 (1939), *acq.* 1940-1 C.B. 1, the Commissioner had allocated a lump-sum price pro rata among the fixed brewery assets and beer inventory. Taxpayer objected that this created a false profit upon disposition of the beer inventory. The full Tax Court agreed, holding that there must be allocation of the first portion of the lump-sum price to the inventory, with the balance spread among the fixed assets.

In *Harlan E. McGregor*, 14 T.C.M. 897 (1955), a taxpayer sold stored crops shortly after he had bought a farm and the crops for a lump-sum price. As a result of his allocation of price among all of the purchased assets, he claimed a crop basis in excess of sale price and a loss on the sale. The Commissioner fixed the basis of the crops at their sale price, which amounted to giving them first allocation of cost, and thereby eliminated the loss. The Court upheld the Commissioner.

In the only case of this kind where the Commissioner seems to have questioned the principle of first allocation to current assets, the Tax Court somewhat modified the principle by making first allocation to such items as cash, receivables, prepaid insurance, factory supplies and deferred charges, but considered that inventory and work in process required further effort and expense before they could be turned into cash and therefore were not the equivalent of cash; the Commissioner's allocation of cost to them was sustained for lack of better evidence. *F & D Rentals, Inc.*, 44 T.C. No. 32, C.C.H. Dec. 27,424 (1965). The case is pending on the taxpayer's appeal to the Court of Appeals Seventh Circuit.

There is a group of cases which may at first blush appear to cast doubt upon the principle of first allocation of a lump-sum price to current assets; but if they are properly analyzed they are not in point. These cases involve the purchase of a bundle of homogeneous assets and the liquidation of some of the assets from the bundle.

For instance, in *Nathan Blum*, 5 T.C. 702 (1945), one partner bought another's interest in partnership assets that consisted almost entirely of current assets. The Court stated and applied the principle that cost should be allocated to each asset of a purchased bundle upon the basis of its value as a percentage of the total value of the bundle. The taxpayer was attempting to defer any gain until he had recovered the total cost of this homogeneous bundle, which the Court refused to permit.

Likewise in *T. H. Symington & Son, Inc.*, 35 B.T.A. 711 (1937) the question concerned redemption of pre-

ferred stock out of a bundle of assets consisting of various securities and receivables that had been segregated into one corporation ostensibly for liquidation purposes. This was part of a complicated reorganization in which the fixed and operating assets went to another corporate entity. The preferred stock in question was homogeneous with the other assets in the bundle; as in *Blum*, the taxpayer was contending for recovery of the entire cost before reporting the profit on any disposition; specifically, was attempting to avoid tax on the premium paid when the stock was redeemed (originally reported as taxable in its return). In holding for the Commissioner, the Court noted (Op. 738) that the redemption, although shortly following the purchase, was not known or anticipated at the purchase.

The decision below against first allocation of cost to the lemon crop was rested on the *Blum* and *Symington* cases. [R. 50-52] This, we submit, was an error of law.

In *L. M. Graves*, 11 T.C.M. 467 (1952) the taxpayer purchased all of the assets of a corporation for the purpose of liquidating them; apparently they were all liquidated in a little over a year. Since the assets were all held for prompt sale they were homogeneous and deserved pro rata allocation of cost.

The *Blum* and *Graves* cases recognize in any event that a cash equivalent is entitled to first allocation. Insurance received it in *Blum*. Insurance and a promptly liquidated account receivable received it in *Graves* where the Court commented (11 T.C.M. 472-3) that “* * * cost must first be applied in full to any cash or to any asset that is substantially the equivalent of cash * * *.”

Accord *The Bessemer Limestone and Cement Company*, 15 T.C.M. 1277, 1283 (1956). We do not believe that reasonable contention could be made for pro rata allocation to fixed and current assets alike in the purchase of a going farm, manufacturing or mercantile business; but even if it were, it is obvious that a current asset immediately converted to cash is a cash equivalent and entitled to first allocation of cost.¹⁰

The clear rule of law ignored by the Tax Court was that the lemon crop in the instant case, a quick asset immediately converted to cash, was a cash equivalent, and was entitled to first allocation of cost. No gain was realized by cashing it out.

Conclusion.

The decision below should be reversed with instructions: to find no gain on the sale of the lemon crop for its acquisition value of \$212,700; to find that each of the Davis brothers had taxable income of 50% of the \$25,000 paid for the orchard care covenant; and to add a like amount to the basis of the fixed assets acquired by each.

Respectfully submitted,

ARTHUR A. ARMSTRONG,
ARMSTRONG & BROWN,
Counsel for Petitioners.

March 1966

¹⁰An accountant could not in good conscience certify to the realization of gain through such a conversion. See testimony of C.P.A. Herron, 2 R. 571-2.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR A. ARMSTRONG

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

M. PHILIP DAVIS and CAROLYN L. DAVIS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN

Assistant Attorney General

LEE A. JACKSON

DAVID O. WALTER

SOLOMON L. WARHAFTIG

Attorneys

Department of Justice

Washington, D.C. 20530

FILED

MAY 25 1966

WM. B. LUCK, CLERK

FEB 10 1967



INDEX

	Page
ion below-----	1
sdiction-----	2
tion presented-----	2
utes involved-----	3
ement-----	3
ary of argument-----	10
ment:	

The Tax Court correctly held that taxpayers recognized gain in the amount of \$101,572 upon their sale of the unmatured lemon crop-----	12
A. The price paid for the lemon orchard, the unmatured lemon crop and the related assets was properly allocated to those assets in accordance with their fair market values-----	13
B. The Tax Court's findings with respect to the fair market values of the assets that were acquired by taxpayers are correct-----	22
Conclusion-----	26

CITATIONS

es:

<u>Alper v. Commissioner</u> , decided February 27, 1962-----	17
<u>American Fork & Hoe Co. v. Commissioner</u> , decided September 22, 1943-----	17
<u>Apex Brewing Co. v. Commissioner</u> , 40 B.T.A. 1110-----	18
<u>Automobile Club of Michigan v. Commissioner</u> , 353 U.S. 180, rehearing denied, 353 U.S. 989-----	20
<u>Ayer, N.W., & Son, Inc. v. Commissioner</u> , 17 T.C. 631-----	21
<u>Bessemer Limestone and Cement Co. v. Commissioner</u> , decided November 23, 1956-----	15, 17
<u>Blum v. Commissioner</u> , 5 T.C. 702-----	13
<u>Burnet v. Sanford & Brooks Co.</u> , 282 U.S. 359-----	12, 15
<u>Commissioner v. American Liberty Oil Co.</u> , 127 F. 2d 262-----	13
<u>Dixon v. United States</u> , 381 U.S. 68-----	20
<u>Edwards v. Commissioner</u> , decided October 28, 1953-----	20
<u>F. & D. Rentals, Inc. v. Commissioner</u> , 44 T.C. 335-----	18
<u>Farmers Cotton Oil Co. v. Commissioner</u> , 27 B.T.A. 105-----	18
<u>Fox & Hounds, Inc. v. Commissioner</u> , decided September 27, 1962-----	17
<u>Graves v. Commissioner</u> , decided May 14, 1952-----	15, 17
<u>Harber Plywood Co. v. Commissioner</u> , 143 F. 2d 780-----	13
<u>Heiner v. Mellon</u> , 304 U.S. 271-----	12, 15, 20

	Page
<u>Herbert v. United States</u> , decided November 7, 1961-----	1
<u>Hillside National Bank v. Commissioner</u> , 35 T.C. 879-----	2
<u>Kimbell-Diamond Milling Co. v. Commissioner</u> , 14 T.C. 74, affirmed, 187 F. 2d 718, certiorari denied, 342 U.S. 827-----	2
<u>Lucas v. American Code Co.</u> , 280 U.S. 445-----	2
<u>McGregor v. Commissioner</u> , decided August 9, 1955-----	2
<u>Palmer v. Commissioner</u> , 302 U.S. 63-----	2
<u>Philadelphia Steel & Iron Corp. v. Commissioner</u> , decided April 13, 1964, affirmed <u>per curiam</u> , 344 F. 2d 964-----	1
<u>Schlude v. Commissioner</u> , 372 U.S. 128-----	2
<u>Suter, Estate of v. Commissioner</u> , 29 T.C. 244-----	1
<u>Time Oil Co. v. Commissioner</u> , 294 F. 2d 667-----	2
<u>Triple E. Development Co. v. Commissioner</u> , 20 T.C. 619-----	1
<u>Tripp v. Commissioner</u> , 337 F. 2d 432-----	2
<u>Tube Bar, Inc. v. Commissioner</u> , 15 T.C. 922-----	2
<u>United States v. Mattison</u> , 273 F. 2d 13-----	1
<u>Watson v. Commissioner</u> , 345 U.S. 544-----	1
<u>Williams v. McGowan</u> , 152 F. 2d 570-----	1
<u>Williams' Estate v. Commissioner</u> , 256 F. 2d 217-----	2
<u>Zemmer v. Commissioner</u> , decided May 15, 1963-----	1

Statutes:

3 Deerings California Revenue and Taxation Code, Annotated, Section 23151-----	1
---	---

Internal Revenue Code of 1939:

Sec. 13 (26 U.S.C. 1952 ed., Sec. 13)-----	1
Sec. 15 (26 U.S.C. 1952 ed., Sec. 15)-----	1
Sec. 22 (26 U.S.C. 1952 ed., Sec. 22)-----	2
Sec. 111 (26 U.S.C. 1952 ed., Sec. 111)-----	2
Sec. 113 (26 U.S.C. 1952 ed., Sec. 113)-----	2

Miscellaneous:

O.D. 714, 3 Cum. Bull. 49 (1920)-----	1
Treasury Regulations on Income Tax (1954 Code), Sec. 1.61-6 (26 C.F.R., Sec. 1.61-6)-----	2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20375

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

No. 20382

M. PHILIP DAVIS and CAROLYN L. DAVIS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court

[I-R. 28-57) ^{1/} are not officially reported.

I/ "I-R." and "II-R." references are to volumes I and II of the record
on appeal.

JURISDICTION

This petition for review (I-R. 78-85) involves federal income taxes for the taxable year 1953. On June 9, 1961, the Commissioner of Internal Revenue mailed to the taxpayers notices of deficiency, asserting deficiencies in those taxes in the aggregate amount of \$160,833.84. (I-R. 10-19, 22-27.) Within ninety days thereafter, on August 30, 1961, the taxpayers filed petitions with the Tax Court for redeterminations of those deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (Tax Court Docket Entries; I-R. 1-9.) The decisions of the Tax Court were entered on May 20, 1965. (I-R. 67, 77.) The cases are brought to this Court by a petition for review filed on August 12, 1965 (I-R. 78-85), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred upon this Court by Section 7482 of that Code.

QUESTION PRESENTED

Taxpayers, who held an option to purchase a lemon orchard with an unmaturing lemon crop and related assets for a lump-sum price, sold the unmaturing crop at the time of their purchase of the orchard. The question presented on this review is whether the Tax Court correctly held that the purchase price was to be apportioned among the acquired assets on the basis of their relative fair market values and that the excess of the price received for the lemon crop over its cost basis constituted taxable gain to taxpayers.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) General Definition.--"Gross income" includes gains, profits, and income derived * * * from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) Computation of Gain or Loss.--The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) Basis (Unadjusted) of Property.--The basis of property shall be the cost of such property * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 113.)

STATEMENT

The taxpayers, 2/ W. Thomas Davis and M. Philip Davis, were

brothers who resided in California during the period that is here

2/ Elizabeth Lloyd Davis and Carolyn L. Davis, the taxpayers' wives, were joined as parties only because joint returns were filed.

involved. They had been engaged in agriculture since 1950 and had owned lemon acreage since early 1952. Toward the end of 1952 the taxpayers began negotiations to acquire the assets of the Del Norte Citrus Company, a corporation with operating assets consisting of 428.35 acres of land, 354.26 acres of which were planted with lemon trees of varying ages, and land improvements including irrigation lines, underground tanks, wells, roads, and various buildings and wind machines useful in connection with the operation of a lemon orchard. This property was located on the Oxnard plain in Ventura County, California. Lemon trees in the Oxnard plain area produced lemons throughout the entire year, and at any time of the year lemons in all stages of development are on such trees, including the lemon blossoms and pea-size fruit through mature fruit. It generally takes from eight to ten months for lemons in the Oxnard plain area to mature, and generally the period during the year for harvesting mature fruit is in the months of May, June and July. (I-R. 29-31.)

As a result of taxpayers' negotiations, in late April or early May of 1953 they acquired in the name of Tophil Farms, Inc., a non-operating corporation that was wholly-owned by them, options to buy all of the stock of Del Norte for a total price of \$889,615.27. The taxpayers did not have available the \$500,000 in cash needed to complete the purchase and planned to raise the cash by using the cash which Del Norte had in the bank and selling certain of the Del Norte assets. The assets of Del Norte which Tom and Phil planned to sell were certain revolving fund certificates which Del Norte owned in various packing

houses and the lemons on the trees in the Del Norte orchard. They planned to keep the Del Norte land and improvements, including the orchard, and to operate it as a lemon orchard. At the time when they were negotiating for the purchase of the Del Norte properties, they were aware that lemons were in short supply. (I-R. 30-31.)

Commencing in July, 1953, the taxpayers contacted representatives of a number of companies engaged in the manufacture of lemon products, such as processing juice lemons for production of lemon concentrates and frozen juice, in regard to selling the lemon crop. During the course of verbal negotiations with various representatives of lemon processing companies, taxpayers became aware that a number of processing plants did not have sufficient lemons available to meet the commitments which they had for juice and were anxious to buy the entire crop on the trees of the Del Norte orchard for juice purposes. During the latter part of August or early part of September 1953, the taxpayers came to a verbal agreement with representatives of Golden Citrus Juices, Inc., whereby they agreed to transfer the Del Norte lemon crop to Golden Citrus as soon as they acquired title thereto for \$2 per box of merchantable lemons to be picked during the succeeding nine months, with the understanding that a person satisfactory to both parties would subsequently estimate the number of boxes of lemons set on the trees in various stages of development from pea-size up to and including mature fruit. The person selected by Golden Citrus and taxpayers estimated that the lemon crop then set on the trees in various stages of maturity from pea-size to full size, which would be harvested over

a nine-month period, would fill 118,850 field boxes of lemons when harvested. Since there would continuously be lemons picked and freshly setting, this person considered that his estimate would be valid as of any date prior to the end of October, 1953, with respect to the crop then set to be harvested within nine months after the date selected. This estimate was accepted and relied upon by both taxpayers and the representatives of Golden Citrus. The representatives of Golden Citrus calculated that lemons were worth about \$2.54 a box net to the grower on the tree in mature condition. They therefore considered that by purchasing lemons on the Del Norte orchard for a total price of \$237,700, arrived at by multiplying \$2 per box by the estimated harvest of 118,850 boxes, Golden Citrus would make a profit on the lemons themselves as well as maintain a much needed supply of lemons. The oral understanding reached by taxpayers and representatives of Golden Citrus was that Golden Citrus would buy the lemon crop in its condition as then set on the trees of the Del Norte orchard for \$237,700 cash, Golden Citrus to take all risk of loss of damage to the crop. The representative of Golden Citrus then secured the approval of its board of directors and principal stockholders to the purchase of the lemons in the Del Norte orchard for cash. (I-R. 31-34.)

In early September, 1953, after discussing among themselves the prospective 1953-1954 lemon crop and the demand for lemons, the taxpayers came to the conclusion that they should have some interest in the profit that Golden Citrus might realize upon the re-sale of the lemons from the Del Norte orchard. They decided that they should

receive whatever profit Golden Citrus made over and above its \$5 per ton processing fee upon its re-sale of lemons from the Del Norte Orchard. They presented this proposition to the representatives of Golden Citrus. Because of its desperate need for lemons, Golden Citrus agreed to purchase the Del Norte lemons under this condition but insisted that if it agreed to this condition, there should be inserted into the agreement in return therefor an agreement that taxpayers would guarantee Golden Citrus as a minimum number of boxes of merchantable lemons set on the trees of Del Norte orchard the 118,850 boxes that had been estimated to be on the trees. (I-R. 34-35.)

On September 12, 1953, the taxpayers entered into a written contract with Golden Citrus for sale of the lemon crop. This contract recited that taxpayers were in the process of acquiring all of the stock of Del Norte Citrus Company and that upon acquiring this stock they intended to dissolve Del Norte and to distribute all of its assets to its stockholders and provided that as soon as taxpayers acquired all of the stock of Del Norte they would cause it to dissolve and to distribute its assets to them and that they would then sell to Golden Citrus, and Golden Citrus would buy from them the lemon crop for a total price of \$237,700 in cash, plus a sum equal to the net profit, if any, made by Golden Citrus upon the re-sale of the lemon crop. The contract further provided that Golden Citrus was to deposit the sum of \$237,700 in cash in an escrow account in which taxpayers were to deposit a bill of sale to the lemon crop in favor of Golden Citrus. As soon as title to the lemon orchard had vested in the

taxpayers, the escrow agent was to deliver the bill of sale to Golden Citrus and to pay the \$237,700 in cash to the taxpayers. The taxpayers warranted that there were at least 118,850 field boxes of lemons set in the lemon orchard and that Golden Citrus would be able to pick that number of merchantable lemons from a lemon orchard prior to the close of business, June 30, 1954, and that if for any reason beyond the reasonable control of Golden Citrus, it was unable to pick 118,850 boxes of merchantable lemons from the orchard by that date, it would have the right to continue picking merchantable lemons from the orchard until such time as it had picked 118,850 boxes. Taxpayers agreed to maintain the lemon orchard in good condition and to cultivate, fertilize, pest and frost control and otherwise do everything reasonably necessary to maintain a good and healthy production, at their own cost and expense. (I-R. 35-37.)

Under date of September 8, 1953, Tophil Farms, Inc., assigned to taxpayers its option to purchase all the Del Norte stock at a total price of \$889,615.27. On September 17, 1953, Golden Citrus deposited \$237,700 in the Bank of America escrow account that had been opened by taxpayers. On or about September 22, 1953, taxpayers exercised the options to purchase the Del Norte stock. For the purchase of this stock, taxpayers used, in addition to the \$237,700 placed in escrow by Golden Citrus, cash that was in the bank account of Del Norte. On the same date Del Norte was dissolved and its assets were distributed to taxpayers. A bill of sale for the lemon crop was delivered to Golden Citrus at the time that the escrow account was closed. (I-R. 38-39.)

By June 30, 1954, the final date that had been specified for the picking of lemons by Golden Citrus, that company had picked over 142,000 field boxes of lemons. However, in settlement of a dispute that arose between taxpayers and Golden Citrus in which Golden Citrus claimed that a part of the crop belonging to it had been pruned off the trees by employees of taxpayers, Golden Citrus was permitted to pick an additional 15,000 boxes of lemons from taxpayers' orchard during 1955 to compensate for the portion of its crop lost by pruning. (I-R. 39-40.)

The provision for profit on the resale of lemons in excess of the \$5 processing fee of Golden Citrus being returned to taxpayers did not result in any payment to them since the price of lemons declined and Golden Citrus did not make any profit on resale of the lemons. (I-R. 40.)

On their individual income tax returns for the year 1953 taxpayers allocated to the lemon crop, out of the total cost of the orchard, \$237,700, the amount for which the lemon crop had been sold. Accordingly, they recognized no gain or loss on the sale of the lemon crop. The Commissioner determined that the cost allocated by taxpayer to the lemon crop was incorrect and determined deficiencies accordingly. (I-R. 41-44.) The Tax Court rejected taxpayers' contention that the lemon crop was equivalent to cash and held that the total cost of the orchard, less the amount of acquired assets that taxpayers, without objection by the Commissioner, had treated as the equivalent of cash, was to be allocated to the lemon crop and the other

acquired assets, other than those that were treated as the equivalent of cash, in accordance with their relative fair market values. (I-R. 49, 52.) It found that the fair market value of the lemon crop was \$212,700 and that the total of the fair market values of the other assets that had been acquired from the Del Norte Citrus Company, other than those that were treated as the equivalent of cash, was \$823,300. (I-R. 55.) Allocating \$661,537.32, the total purchase price less the amount of acquired assets that were equivalent to cash, between the lemon crop and the other assets it determined that the taxpayers' cost basis in the lemon crop was \$136,128, so that the excess of the \$237,700 sales price over this cost basis constituted gain to them. (I-R. 55-56.)

SUMMARY OF ARGUMENT

Taxpayers, who held an option to purchase a lemon orchard with an unmatured lemon crop and related assets for a lump-sum price, sold the unmatured lemon crop at the time of their purchase of the orchard and used the proceeds of the sale of the crop as part of the purchase price of the orchard. The Tax Court, applying long established principles of federal income tax law, held that the purchase price was to be apportioned among the acquired assets on the basis of their relative fair market values and that the excess of the price that taxpayers received for the lemon crop over its cost basis to them, as so determined, constituted taxable gain to them. In so holding the Tax Court correctly rejected taxpayers' contention that the cost basis of the lemon crop was its fair market value at the time

of the purchase, so that no gain was to be recognized on the sale of the crop. Taxpayers' argument that because of the uncertainty as to the future profitability of the orchard gain should not be recognized upon the disposition of the lemon crop is in direct conflict with the annual accounting principle underlying the federal income tax system, which precludes deferring the recognition of gain until the results of the complete venture are known. Taxpayers' alternate argument that the lemon crop was entitled to a first allocation of cost in the amount of its fair market value as a "cash equivalent" was similarly without merit since the crop was not equivalent to cash. Because the income tax consequences to the seller of the orchard would be worsened materially if the lemon crop was sold separately rather than together with the orchard and the related assets it is apparent that unlike cash or the immediate right to receive cash, the portion of the purchase price attributable to the lemon crop was substantially less than the fair market value of the crop.

With one minor exception, both taxpayers' and the Commissioner's appraisers were in substantial agreement as to the fair market values of the acquired assets. Since the Tax Court's findings as to these values have substantial support in the evidence they are entitled to affirmance.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT TAXPAYERS RECOGNIZED GAIN IN THE AMOUNT OF \$101,572 UPON THEIR SALE OF THE UNMATURED LEMON CROP

Taxpayers purchased a lemon orchard with an unmatured crop and related assets for a total price of \$661,537.32.^{3/} At the time of this purchase, taxpayers sold the unmatured lemon crop for \$237,700. The Tax Court found that, as of the time of the purchase, the lemon crop had a fair market value of \$212,700 and the orchard and related assets had a fair market value of \$823,300. It held that the total price paid for these assets, \$661,537.32, was to be apportioned among them on the basis of their relative fair market values, which totaled \$1,036,000, with the result that \$136,128 of the purchase price was allocated to the lemon crop and the difference between the allocated cost and the price received for the crop, \$101,572, constituted taxable gain to taxpayers. Taxpayers recognize (Br. 28-29) -- at least implicitly, if not explicitly -- that the annual accounting principle which underlies the federal income tax system (Burnet v. Sanford & Brooks Co., 282 U.S. 359, 365) requires that the price paid for a group of assets be apportioned among the assets and gain or loss recognized upon the disposition of part of the assets during the taxable year, and prevents deferral of the recognition of gain until the total cost of the assets has been recovered (Heiner v. Mellon, 304 U.S.

^{3/} Taxpayers actually purchased the stock of the corporation owning these assets for a total price of \$889,615.27, but immediately thereafter liquidated this corporation. (I-R. 38-39.) Accordingly, the Tax Court treated the \$889,615.27 as the price paid for the assets. See Kimbell-Diamond Milling Co. v. Commissioner, 14 T.C. 74, affirmed 187 F. 2d 718 (C.A. 5th), certiorari denied, 342 U.S. 827; United States v. Mattison, 273 F. 2d 13, 17-21 (C.A. 9th). Taxpayers, without objection by the Commissioner, allocated \$228,077.95 of the price to a group of assets that they treated as the equivalent of cash, leaving \$661,537.32 as the cost of the remaining assets.

21, 275-276; Commissioner v. American Liberty Oil Co., 127 F. 2d 52, 264 (C.A. 5th); Blum v. Commissioner, 5 T.C. 702, 709). This allocation of the total cost among the several assets is made in accordance with their relative fair market values as of the time of the acquisition. Harber Plywood Co. v. Commissioner, 143 F. 2d 780, 83 (C.A. 9th); United States v. Mattison, 273 F. 2d 13, 21 (C.A. 5th); Commissioner v. American Liberty Oil Co., supra, 127 F. 2d, 624. Taxpayers argue, however, that the Tax Court erred in determining that they recognized gain of \$101,572 in connection with their sale of the unmatured lemon crop. This argument is based on their contentions: (1) that where, as here, a portion of the assets are sold immediately upon acquisition no gain is to be recognized with respect to that sale, and (2) that in any event the fair market value of all of the acquired assets was only \$661,537.32. We submit that there is no merit to either of taxpayers' contentions and that the Tax Court's determination that they recognized gain in the amount of \$101,572 with respect to the sale of the lemon crop is correct.

- A. The price paid for the lemon orchard, the unmatured lemon crop and the related assets was properly allocated to those assets in accordance with their fair market values

In attempting to avoid the application here of the rule that the price paid for a group of assets must be apportioned among them on the basis of their relative fair market values and that gain or loss must be recognized upon a disposition of any of these assets, taxpayers seek to create an exception for a situation where the purchase includes

both fixed assets and current assets and where some of the current assets are sold immediately following the purchase. Taxpayers argue that in such a situation the price paid for the group of assets should be allocated first to the current assets to the extent of their full fair market values, with only the remaining cost allocated to the other assets, which will result in the nonrecognition of gain with respect to the disposition of the current assets. The reason given by taxpayers for their contention as to the impropriety of uniformly allocating purchase price to the current and fixed assets of a going business on the basis of their relative fair market values is that the value of the fixed assets to the buyer of the business depends on the extent to which the future operations of the business will be profitable. Because of this uncertainty with respect to the future success of the business the buyer should, according to taxpayers, be permitted to recoup on a tax-free basis, through the disposition of the current assets, as great a portion of the price paid for the business as the amount of its current assets will permit, which result will obtain if the buyer is permitted to make a first allocation of cost to the current assets. Thus, taxpayers' argument is that they should not be required to recognize income with respect to the sale of one of the purchased assets when there was a possibility that the complete venture, i.e. the purchase of the Del Norte assets, would not have been a profitable one. This argument, however, is without merit and must be rejected, for it is in direct conflict with the annual accounting theory, which subjects to tax the gains of particular periods, regardless

of the fact that the entire venture may turn out to be an unprofitable one. Burnet v. Sanford & Brooks Co., *supra*; Heiner v. Mellon, *supra*.

Taxpayers also argue, alternatively, that since the unmatured lemon crop was immediately sold it was a "cash equivalent" and was therefore entitled to first allocation of cost to the extent of its fair market value. The Tax Court has held, in cases where cash and assets constituting the immediate right to receive cash were acquired together with other assets in a lump sum purchase, that the price paid was to be allocated first to the cash and immediate rights to receive cash to the extent of their face amounts, with the remaining cost allocated to the other assets in accordance with their fair market values. Graves v. Commissioner, decided May 14, 1952 (P-H Memo T.C., par. 52,143); Bessemer Limestone and Cement Co. v. Commissioner, decided November 23, 1956 (P-H Memo T.C., par. 56,250). The unmatured lemon crop did not, however, like a bank deposit or the cash surrender value of insurance, constitute a right to receive cash. Certainly an asset is not "equivalent to cash" merely because it is saleable and is in fact sold; for on this basis even a portion of the land acquired would have been a "cash equivalent" if taxpayers had immediately sold it. But more significantly, the rationale underlying the first allocation of cost to cash and the immediate right to receive cash -- that one will ordinarily not sell cash or the immediate right to receive cash at a discount, since he can obtain the benefit of one hundred percent of its value simply by retaining it, and that therefore the purchaser will have paid its full face

amount for it (cf. Williams v. McGowan, 152 F. 2d 570, 572 (C.A. 2d)) -- is inapplicable to the lemon crop. While the lemon crop had a fair market value of \$237,700 as of September, 1953, it was certainly not equivalent to that amount of cash in the hands of the Del Norte Citrus Company, from whom taxpayers acquired it. Assuming that it would have been feasible for Del Norte to sell the crop before its stock was sold to taxpayers,^{4/} the proceeds of the sale would have been taxed to the corporation as ordinary income. Watson v. Commissioner, 345 U.S. 544, 551-552. During 1953, the year here in issue, the corporation's ordinary income was subject to federal income tax at the rate of 30 percent of the first \$25,000 and 52 percent of the excess (see Internal Revenue Code of 1939, Sections 13(b)(2) and 15(b), as amended by Sections 121(a) and (f), Revenue Act of 1951, c. 521, 65 Stat 452) and to state franchise tax at the rate of 4 percent (see 3 Deering's California Revenue and Taxation Code, Annotated, Section 23151). Thus, the net amount of cash that the corporation would have derived upon the sale of the crop would have been substantially less than \$237,700. Under these circumstances the Del Norte shareholders would not expect to receive and taxpayers would certainly not pay them \$237,700 with respect to the lemon crop. Clearly, the lemon crop was in no respect a "cash equivalent".

^{4/} The sale by taxpayers of the unmatured lemon crop required an agreement by them to maintain the lemon orchard in good and healthy production during the period when the crop would be on the trees. (I-R. 37, 38.) There has been no showing that one about to dispose of a lemon orchard would be willing to assume the liability that would arise under such an agreement in the event that the purchaser of the orchard failed to so maintain it.

None of the cases cited by taxpayers support their contention that the lemon crop was entitled to first allocation of cost so that no gain was to be recognized upon the sale of the crop. The eight cases cited by taxpayers at the bottom of page 26 and the top of page 27 of their brief ^{5/} did not involve the question of allocation of cost to current assets and the recognition of gain with respect to the disposition of such assets. In these cases the Commissioner had simply not disturbed the taxpayers' allocation of cost with respect to the relatively insignificant amounts of current assets, which, in a number of the cases, was based on the allocation of the purchase price that the parties had agreed to in the contract of sale. In a case where the court did consider this question, Graves v. Commissioner, supra, cited by taxpayers (Br. 29), it permitted a first allocation of cost only with respect to cash and immediate rights to receive cash, i.e. the cash surrender value of insurance policies and the funds that were immediately withdrawable from an account with a factoring company. On the other hand, the court did not permit a first allocation of cost even with respect to items of inventory and supplies that were returned to the original vendors for credit or to ordinary accounts receivable. In Bessemer Limestone and Cement Co. v. Commissioner, supra, cited by taxpayers (Br. 30), a first allocation

^{5/} American Fork & Hoe Co. v. Commissioner, decided September 22, 1943 (P-H Memo T.C., par. 43,431); Philadelphia Steel & Iron Corp. v. Commissioner, decided April 13, 1964 (P-H Memo T.C., par. 64,093), affirmed per curiam, 344 F. 2d 964 (C.A. 3d); Estate of Suter v. Commissioner, 29 T.C. 244, acquiescence, 1958-2 Cum. Bull. 8; Zemmer v. Commissioner, decided May 15, 1963 (P-H Memo T.C., par. 63,131); Fox & Hounds, Inc. v. Commissioner, decided September 27, 1962 (P-H Memo T.C., par. 62,229); Herbert v. United States (S.D. Calif), decided November 7, 1961 (8 A.F.T.R. 2d 5824); Alper v. Commissioner, decided

of cost was permitted only with respect to "cash and its equivalents"; the court did not even suggest that anything other than cash and the immediate right to receive cash came within this category. Similarly, in F. & D. Rentals, Inc. v. Commissioner, 44 T.C. 335, on appeal to the Court of Appeals for the Seventh Circuit, where the Commissioner did not disturb the taxpayer's allocation of cost to the current assets ^{6/} other than inventories, the court held that neither the finished goods nor the other inventories were the equivalent of cash and, as such, entitled to first allocation of cost and that since the taxpayer had failed to show the fair market value of the inventories, so as to permit an allocation of cost in accordance with fair market values, and had not shown that the Commissioner's allocation of cost to the inventories was unreasonable, the Commissioner's allocation would be sustained. In Apex Brewing Co. v. Commissioner, 40 B.T.A. 1110, acquiescence, 1940-1 Cum. Bull. 1, the Commissioner sought to allocate the purchase price of a brewery among the acquired assets in accordance with their original costs to the seller. The taxpayer did not show the value of the fixed assets, beyond a showing that a substantial portion of these assets were obsolescent and inferior.

^{5/} (contd.) February 27, 1962 (P-H Memo T.C., par. 62,038); Farmers Cotton Oil Co. v. Commissioner, 27 B.T.A. 105, non-acquiescence XII-1 Cum. Bull. 16 (1933).

^{6/} With the exception of the inventories, the only current assets of any significance acquired by the taxpayer were accounts receivable, the collection of which was guaranteed by the seller. Since none of the risk of noncollection of these receivables was shifted from the sellers to the taxpayer, the portion of the purchase price attributable to these receivables could not have been substantially less than their face amount.

It did show that the seller of the brewery had offered to repurchase the beer at \$7 per barrel and that the inventory value of the beer to it, based on its actual sales, was \$6 per barrel, which value was more than 2-1/3 times greater than the amount allocated to the beer inventory by the Commissioner. The court, having rejected the Commissioner's allocation, which was based on the original costs to the seller, on these facts permitted cost of \$6 per barrel to be allocated to the beer inventory, with the balance of cost to be allocated to the other assets. Regardless of the correctness of this decision, it is apparent that it does not hold that where the fair market values of all of the acquired assets are known a first allocation of cost is to be made to assets other than cash and the immediate right to receive cash.

O.D. 714, 3 Cum. Bull. 49 (1920), cited by taxpayers (Br. 24-25), sets forth the rule that where a taxpayer purchases land on which an unmatured crop is growing and later sells the crop, the income to be recognized by him upon the sale of the crop is not the full amount received for the crop, as would be the case had the land not been purchased during that crop year, but only the excess of the net selling price of the crop over its cost. Cf. Triple E. Development Co. v. Commissioner, 20 T.C. 619. The statement in the O.D. that in the absence of an assignment of part of the purchase price to the crop, gain or loss is to be determined on the basis of the fair market value of the crop necessarily assumes that there is no showing that the price paid for the land and the

crop was less than their fair market values. If, as taxpayers contend, the O.D. purported to permit them to offset the fair market value of the crop against its selling price even though the cost of the crop to them was less than its fair market value, ^{7/} and to thus not recognize for tax purposes the gain that they had realized on the disposition of the crop, it would be contrary to the annual accounting principle underlying the federal tax system (Heiner v. Mellon, supra), and being a wholly incorrect statement of the law would not bar the Commissioner from applying the correct legal principle (Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183-186, rehearing denied, 353 U.S. 989; Dixon v. United States, 381 U.S. 68, 70-76; Time Oil Co. v. Commissioner, 294 F. 2d 667, 672-673 (C.A. 9th), concurring opinion of Judge Stephens).

Taxpayers incorrectly state (Br. 21) that the loss resulting from the sale of an asset that has just been acquired in a lump-sum purchase of a group of assets is not deductible. The regulation (Treasury Regulations on Income Tax (1954 Code), Section 1.61-6(a)) providing for the recognition of gain or loss upon the disposition of such an asset does not exclude a disposition that follows immediately after the purchase. None of the cases cited by taxpayers (Br. 21) support their statement. In Tube Bar, Inc. v. Commissioner,

^{7/} Contrary to taxpayers' statement (Br. 25), other taxpayers have recognized that the purchase price of an orchard is to be allocated among all of the acquired assets including the unmaturing crop according to their fair market values, where the total of these fair market values exceed the purchase price. See Edwards v. Commissioner, decided October 28, 1953 (P-H Memo T.C., par. 53,344).

15 T.C. 922, the taxpayer purchased a tavern in order to obtain its liquor license, which was to be transferred to another location, and then sold the tavern, without the license, for \$2,900 less than it had paid. The court correctly held that the excess of the price that taxpayer paid over the amount that it received constituted the cost of the license, which it had retained, and was not deductible. In N. W. Ayer & Son, Inc. v. Commissioner, 17 T.C. 631, acquiescence, 1952-1 Cum. Bull. 1, and Hillside National Bank v. Commissioner, 35 T.C. 879, the court held that where improved real estate is purchased with the intention of removing the improvements thereon in order to use the land all of the purchase price, as increased by the cost of demolishing or removing the improvements and as decreased by amounts received upon the sale of any improvements salvaged from the property, is allocable to the land. Since, in such a situation, the value, if any, of the improvements that are to be removed or demolished is limited to what can be obtained from their salvage and is unrelated to the value that they would have if they were to remain and be used on the property, allocation to the improvements of a portion of the purchase price equal to the latter value would clearly be incorrect. This does not mean, however, that where property is purchased with the intention of immediately selling a part of it, the purchase price should not be allocated to the various parts in accordance with their fair market values as separate assets, and gain or loss recognized upon the sale. In McGregor v. Commissioner, decided August 9, 1955 (P-H Memo T.C., par. 55,223),

cited by taxpayers (Br. 27), the court stated the rule that where a lump-sum consideration is paid for a conglomeration of assets the cost of each asset is to be determined by apportioning the purchase price among the assets on the basis of their relative fair market values at the time of acquisition and then simply held that taxpayers had failed to show that the portion of the price paid for the farm that would be so allocable to the crop was greater than the amount that had been allocated to it by the Commissioner.

In the instant case, since the fair market values of the assets acquired exceeded the lump-sum purchase price, the cost of one of these assets, i.e. the lemon crop, was properly determined by apportioning the purchase price among the assets on the basis of their relative fair market values at the time of purchase. The excess of the price received by taxpayers upon their sale of the crop over its cost to them, as so determined, constituted taxable gain to them in the year of the sale.

B. The Tax Court's findings with respect to the fair market values of the assets that were acquired by taxpayers are correct

The Tax Court did not fully accept either the opinion of the Commissioner's appraiser or the opinion of taxpayers' appraiser as to the fair market value of the Del Norte assets at the time of their acquisition by taxpayers; but after considering the reports of both of these appraisers and the testimony of the Commissioner's appraiser, who testified at the trial as an expert witness, ^{8/}

^{8/} The taxpayers did not call their appraiser to testify.

determined that the total of the fair market values of the assets, other than the unmatured lemon crop, which was valued at \$212,700, was \$823,300.^{9/} This finding has substantial basis in the evidence and certainly cannot be said to be clearly erroneous. Accordingly, this finding must stand. Palmer v. Commissioner, 302 U.S. 63, 70; Williams' Estate v. Commissioner, 256 F. 2d 217, 220 (C.A. 9th); Tripp v. Commissioner, 337 F. 2d 432, 434 (C.A. 7th).

Contrary to taxpayers' contention (Br. 17, 22-23), the Tax Court did not misinterpret the appraisal report of Sherman Taschner, the taxpayers' appraiser. Taxpayers do not dispute the correctness of the Tax Court's statement (I-R. 55) that, with the exception of the value assigned to the lemon trees,^{10/} there were no substantial differences between the fair market values assigned to each of the various acquired assets by taxpayers' and the Commissioner's appraisers. Taxpayers argue, however, that the Tax Court erred in considering the fair market values placed upon the various assets by their own appraiser, because of the last four paragraphs of his report, which they quote (Br. 16-17), wherein he states that notwithstanding his own opinion as to the fair market value of each of the various

^{9/} This does not include the value of those acquired assets to which taxpayers, without objection by the Commissioner, allocated \$228,077.95 of the total cost. See fn. 3, supra.

^{10/} The Tax Court accepted the lower value that had been assigned to the lemon trees by the Commissioner's appraiser since that value did not include the unmatured lemon crop, which the court valued separately. (I-R. 55.) The court also accepted the lower value that had been assigned to the land by taxpayers' appraiser. (I-R. 56.)

assets acquired by the taxpayers, the fair market value of the lemon orchard with the related assets could not exceed the total purchase price less the amount that was received upon the sale of the lemon crop. This statement by taxpayers' appraiser -- which merely repeats in slightly different form taxpayers' basic contention upon this review, that no gain was realized upon the sale of the lemon crop -- is both incorrect and irrelevant. This statement is based on the assumption that the lemon crop was equivalent to cash, so that the portion of the purchase price attributable to it was equal to its fair market value, an assumption which, as we have shown, pp. 15-16, supra, is incorrect. ^{11/} Moreover, in focusing on this statement by their appraiser, taxpayers indicate an apparent misunderstanding on their parts as to the purpose of the allocation of a lump-sum purchase price. Where a group of assets is purchased for a lump-sum price it is necessary to allocate a portion of the price to each of the acquired assets in order to determine the cost of each of them, since the depreciation on a depreciable asset as well as the gain or loss upon the disposition of an asset depends on the cost of that asset. In such a situation, the cost of each of the assets is determined by apportioning the purchase price among them on the basis of their relative fair market values. Accordingly, in

^{11/} The testimony of Alvin Herron, taxpayers' accountant (II-R. 571-572), cited by taxpayers (Br. 30), is based on the same incorrect assumption. Even if his testimony was a correct statement of the proper accounting practice to be followed in such a situation, it would however, be irrelevant, since the recognition of gain for tax purpose does not depend on how the transaction would be treated under commercial accounting standards. See Schlude v. Commissioner, 372 U.S. 128 cf. Lucas v. American Code Co., 280 U.S. 445, 452.

determining the cost of the lemon crop the Tax Court apportioned the purchase price among the acquired assets, i.e. the land, the trees, the buildings, the equipment and the unmatured lemon crop on the basis of their relative fair market values, ^{12/} as to which, with the exception of the value of the trees, the appraisers were in substantial agreement. That the fair market value of the assets other than the lemon crop, if taken together, might have been less than the total of their individual fair market values would be relevant only if taxpayers were required to recognize gain with respect to the purchase of these assets, which they are not. It would be irrelevant here, where the sole significance of the fair market values of the acquired assets is that they serve as the basis for apportionment of the purchase price.

^{12/} Since, in this portion of its opinion, the Tax Court was determining only the cost of the lemon crop, it was able to accomplish this by simply adding together the fair market values of the assets other than the lemon crop and then apportioning the purchase price between that total and the fair market value of the lemon crop. (I-R. 56.)

CONCLUSION

The Tax Court's determination that taxpayers recognized gain of \$101,572 upon the disposition of the lemon crop is correct and should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN

Assistant Attorney General

LEE A. JACKSON

DAVID O. WALTER

SOLOMON L. WARHAFTIG

Attorneys

Department of Justice

Washington, D. C. 20530

May, 1966

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this _____ day of May, 1966.

Attorney

Nos. 20375, 20382

FEB 10 1957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS, M.
PHILIP DAVIS and CAROLYN L. DAVIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decisions of the Tax Court
of the United States.

REPLY BRIEF FOR THE PETITIONERS.

ARTHUR A. ARMSTRONG,
ARMSTRONG & BROWN,
Suite 835,
458 South Spring Street,
Los Angeles, Calif. 90013,
Counsel for Petitioners.

FILED

JUN 14 1956

WM. B. LUCK, CLERK

TABLES OF AUTHORITIES CITED

Cases	Page
Com. v. South Lake Farms, Inc., 324 F. 2d 837, 64-1 U.S.T.C. 9101 (C.A. 9th, 1964) affg. 36 T.C. 1027	2
Statutes	
Internal Revenue Code of 1954, Sec. 337	2
Rulings	
O. D. 714, 3 C.B. 49	3, 4, 5

Note: In order to condense our reply, we have not re-cited cases hereinafter referred to which were cited in our original brief; but rather have referred to the page of the original brief where the citation appears. Hence, the above table includes only authorities cited for the first time in this reply brief. We note, however, that the table in the original brief omitted reference to O. D. 714, 3 C.B. 49, which appears on pages 24 and 25 of the original brief.

Nos. 20375, 20382

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. THOMAS DAVIS and ELIZABETH LLOYD DAVIS, M.
PHILIP DAVIS and CAROLYN L. DAVIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

On Petition for Review of the Decisions of the Tax Court
of the United States.

REPLY BRIEF FOR THE PETITIONERS.

Our reading of respondent's brief leaves the impression of a collection of random thoughts half-heartedly advanced in support of a doubtful cause. This is understandable in view of the fact that respondent is now in an inconsistent position. In attempting to support the Tax Court's proration of price between the lemon crop and the orchard, respondent is reversing the Revenue Agent's report and deficiency notice which gave first allocation of price to the crop along with other current assets; and contravening his own continued first allocation of price to the other current assets, some of which were converted to cash after the crop was. [See discussion,

Pet. Br. pp. 8-12, Tax Court's comments, R. 47.] Respondent's brief attempts no justification of this inconsistency.

Respondent stresses the annual accounting concept of income taxation (Resp. Br. pp. 12, 14, 20) but that does not go to the issue here. If that concept required a determination of taxable gain or loss whenever any realization occurred, then the receipt of cash or cash equivalents from a purchased bundle of assets would result in gain or loss; which is concededly not so. (Resp. Br. pp. 15-18.)

Respondent says (Resp. Br. p. 16) that because Del Norte corporation would have had to pay income tax had it sold the crop, "the Del Norte shareholders would not expect to receive and taxpayers would certainly not pay them \$237,700 with respect to the lemon crop," a *non sequitur*. The record here does not show whether Del Norte corporation's 1953 deductions would have exceeded its income if it had sold the crop. But Del Norte corporation did not sell the crop, and it realized no taxable gain from the liquidating distribution following sale by the stockholders of their stock. *Com. v. South Lake Farms, Inc.*, 324 F. 2d 837, 64-1, U.S.T.C. 9101 (C.A. 9, 1964), aff'g 36 T.C. 1027. Indeed a liquidating corporation, itself, may make a tax-free sale of its assets including inventory. Internal Revenue Code, Section 337. In any event, the purchasers' allocation of price among acquired assets cannot logically depend upon the tax liability of the sellers or their corporation.

The question whether taxpayers were paying the \$237,700 to the Del Norte shareholders "with respect to the lemon crop," was immaterial to the selling shareholders, but vital to the taxpayer-purchasers. They

needed the \$237,700 to conclude the deal; did not exercise their option until after the money for the presold crop was in escrow. [R. pp. 31, 38.] Had that amount of cash been in the corporate till, the buyers clearly would have paid an equal amount of the price for it. The same conclusion follows where the buyers finalized their purchase commitment only after completing arrangements to have the cash in the till at point of purchase.

The Revenue Agent's report and deficiency notice in this case followed O. D. 714, 3 C.B. 49, which for the past 46 years has treated value as the basis of a growing crop bought with the land, *i.e.*, given the crop first price allocation. Respondent's reinterpretation and repudiation of this venerable ruling (Resp. Br. pp. 19-20) are surprising.¹

The ruling speaks in plain terms of basis equal to "the fair market value" of the crop "at the time of purchase." There is no justification at this late date for interpolating the foolish words "assum[ing] that there is no showing that the price paid for the land and the crop was less than their fair market values," as respondent would have us do. (Resp. Br. pp. 19-20.) We say "foolish words" because the ruling obviously contemplates an arms-length sale and purchase, in which the price paid represents the fair market values of land and crop. Had the Revenue Service intended to deny the application of this ruling because of opinion evidence that land value was more or less than purchase price minus crop value, the books would be full of cases litigating this issue. Compare *Herbert* (Pet. Br. p. 27)

¹It is doubtful that the Revenue Service would concur with the Department of Justice in so doing.

where the Commissioner conceded and the Court allowed first allocation of price to crop, and *McGregor* (Pet. Br. p. 27) where the Commissioner persuaded the Court to accept such first allocation in order to deny the purchasing farmer a deductible loss from the crop sale.

Obviously there would be serious concern in the farming community if O. D. 714 were now invalidated. The business community also would be seriously concerned if the Revenue Service were now to repudiate or this Court to reverse the rule that in a purchase of current and fixed assets of a going business, the current assets are entitled to first price allocation. Long standing adherence of the Service to this principle is amply demonstrated by the Commissioner's agreement with it in the cases cited at Petitioners' Brief, pages 26-27 as well as his acquiescence in *Apex Brewing Co.* (Pet. Br. p. 27), 1940-1 C.B. 1, and his resistance to claimed loss in *McGregor* (Pet. Br. p. 27). Even in *F & D Rentals, Inc.* (Pet. Br. p. 28) receivables and prepaid items were given prior allocation with the Commissioner's consent.

Respondent does not comment (see Resp. Br. pp. 13-20) upon our point that there is no disharmony between the foregoing cases and *Blum*, *Symington* and *Graves*. (Pet. Br. pp. 28-29.)² Each of the latter cases involved

²*The Bessemer Limestone and Cement Company* (Pet. Br. p. 30) decided that assets acquired by a corporation through insolvency reorganization should have a basis equal to the security holders' cost rather than the lower fair market value of the assets. The actual allocation was made under Rule 50; it is unlikely that it resulted in increasing the basis of current assets over book value, but this cannot be determined from the opinion. Respondent's evaluation of the case (Resp. Br. pp. 17-18) is inaccurate.

a bundle of homogeneous assets to be disposed of in a comparatively short period of time, so that none of the assets deserved preferential price allocation. In *Blum* they were current assets of a partnership; in *Symington* they were securities and receivables segregated for liquidation; in *Graves* they were the assets of a terminated business purchased for liquidation. These situations are economically distinct from one where a purchaser, like the Davis brothers, buys a mixed group of assets for the purpose of indefinitely continuing the business operation with the fixed assets.

We do not believe that this Court will be inclined to reverse the long standing rule of O. D. 714 or of first allocation of price to current assets purchased with fixed assets of a going business; but even if it did, respondent's case is doomed. He concedes (Resp. Br. pp. 15-18) that a cash equivalent is entitled to first price allocation, but his reason for distinguishing the Del Norte lemon crop from a cash equivalent (Del Norte corporation's tax liability) is fallacious.

Necessarily cash equivalents must be determined at the point of purchase. Prior to the purchase, and prior to exercise of their option which bound them to make it, taxpayers had devoted speculative efforts to financing and completing the purchase, including the conversion of the crop to cash. By the time of the exercise of the option and the making of the purchase, however, the conversion was complete; cash for the crop was in the bank escrow. Hence, the crop was more like cash than

the cash equivalents discussed in the cited cases, for example, than the insurance and receivables in *Graves* (Pet. Br. p. 29) which required post-purchase acts of the purchaser for conversion to cash.

Respectfully submitted,

ARTHUR A. ARMSTRONG,
ARMSTRONG & BROWN,

Counsel for Petitioners.

June, 1966.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR A. ARMSTRONG

FEB 10 1951

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants

v.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS FEDERAL HOME LOAN BANK BOARD
AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General,

MANUEL L. REAL,
United States Attorney,

CARL EARDLEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Counsel

NETH E. SCOTT,
General Counsel,
Federal Home Loan Bank Board,

WILFAND,
Assistant General Counsel,
Federal Home Loan Bank Board.

FILED

NOV 3 1966

WM. B. LUCK, CLERK

I N D E X

	<u>Page</u>
ISDICTIONAL STATEMENT -----	2
TEMENT OF THE CASE -----	6
. The Facts -----	6
. Proceedings in the District Court -----	16
. The District Court Decision -----	19
. Statutes and Regulations Involved -----	19
. Specification of Errors -----	22
MARY OF ARGUMENT -----	24
UMENT -----	25
I. THE DISTRICT COURT HAD NO POWER TO CHANGE THE DISTRIBUTION TERMS OF THE MERGER AGREEMENT AND, AS APPELLEES REQUESTED, TO ORDER DISTRIBUTION OF EQUITABLE STOCK ON A PRO RATA OR ANY OTHER BASIS -----	25
A. The Governing Statutes and Regulations -----	25
B. The District Court Action was Taken Without Obtaining The Necessary Approvals -----	29
C. The Necessary Administrative Approvals to the District Court's Formula Were Not Sup- plied Either in the Approved Merger Agreement or in The Settlement Agreement of February 14, 1962 -----	31
II. IN THE CIRCUMSTANCES OF THIS CASE, THE AGGRIEVED LONG BEACH SHAREHOLDERS, NOT HAVING SOUGHT TO ENJOIN CONSUM- MATION OF THE MERGER, ARE NOT ENTITLED TO ANY RELIEF -----	37

A.	The Only Conceivable Relief to Which The Aggrieved Long Beach Shareholders Might Be Entitled Is To Set Aside The Merger	37
B.	Laches Bars Relief by Way of Setting Aside the Merger	39
III.	IN ANY EVENT, THE DISTRIBUTION TERMS OF THE MERGER AGREEMENT ARE VALID	44
A.	The Long Beach Charter Does Not Require Pro Rata Dis- tribution in the Case of a Merger	44
B.	Assuming Arguendo, That There is a Conflict Between the Dis- tribution Terms of the Merger Agreement and the Long Beach Charter, the Merger Terms, if Fair, Must Prevail	48
1.	The Board's statutory and regulatory powers are part of the Long Beach Charter	48
2.	As between merger terms and charter provisions the merger terms prevail, if fair	50
3.	The factual basis in support of the Board's determination that the distribution terms of the Merger Agreement are fair	50
4.	The Board's determination of fairness must prevail since there was a rational basis to support it	57

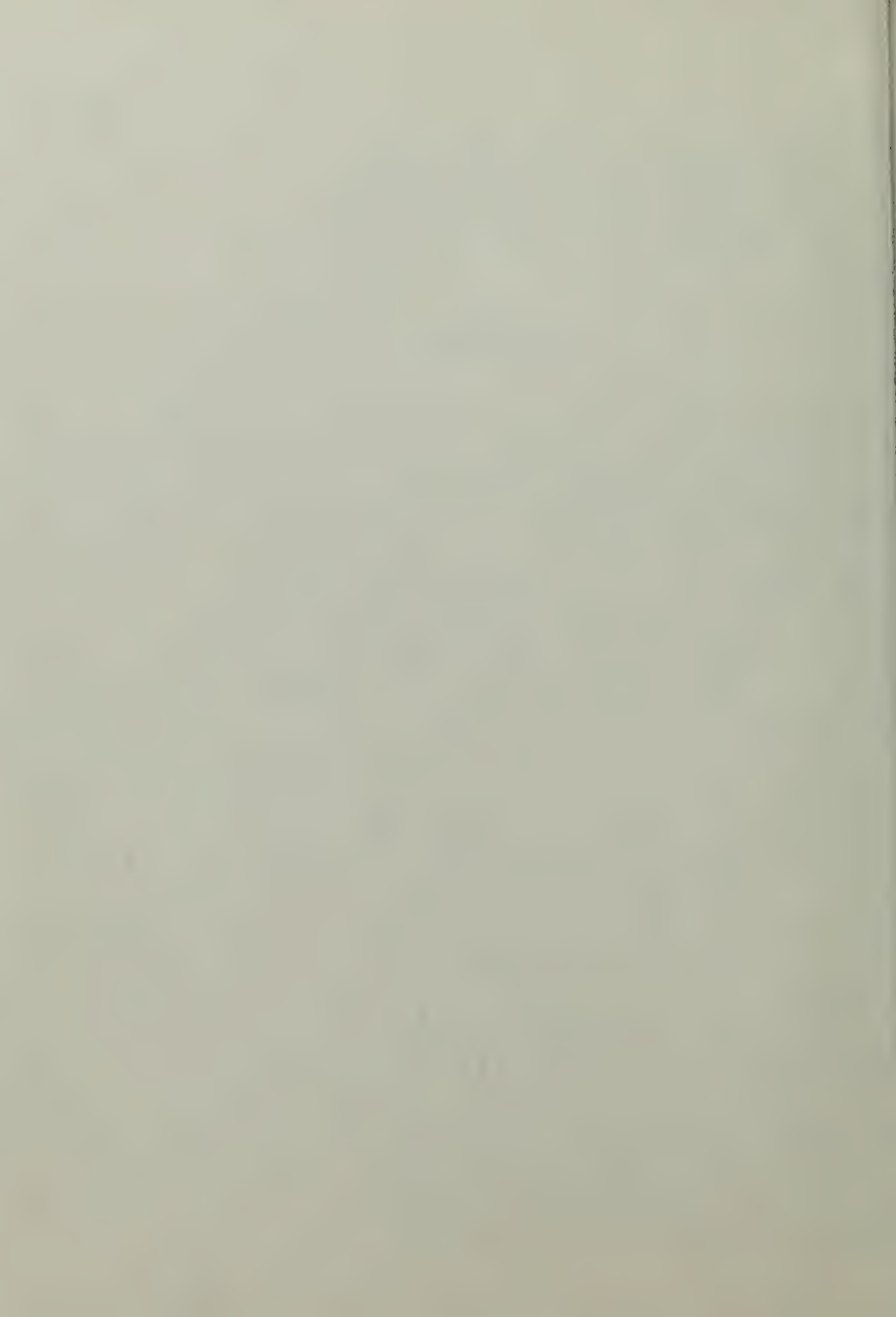
IV. THE CALIFORNIA COMMISSIONER IS AN INDISPENSABLE PARTY TO THE ACTIONS; SINCE HE WAS NOT SUBJECT TO SUIT IN THE DISTRICT COURT, THE ACTIONS MUST BE DISMISSED -----	65
---	----

CONCLUSION -----	67
------------------	----

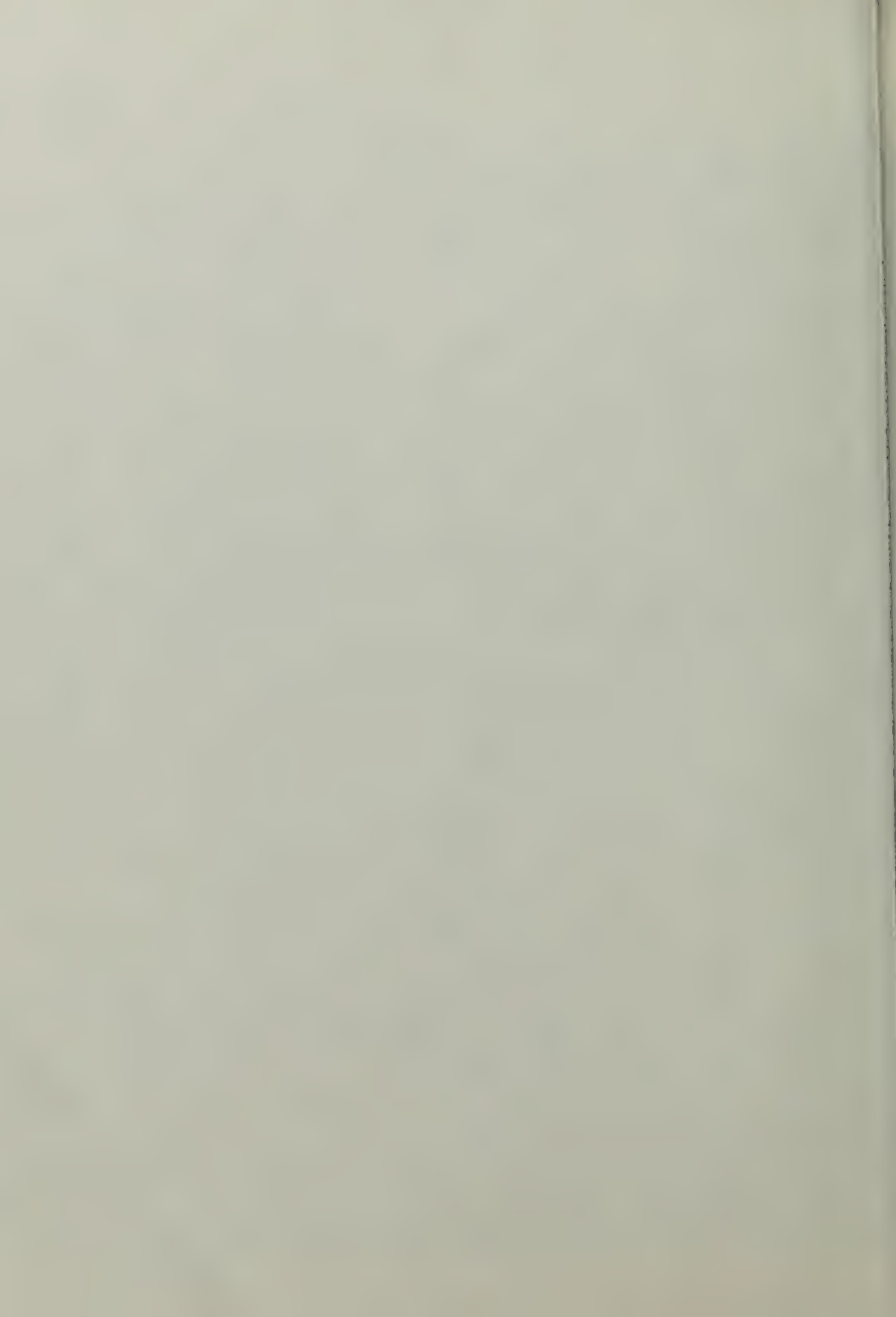
CITATIONS

ses:

bott, Puller & Myers v. Peyser, 124 F. 2d 524 (D.C. Cir., 1941) -----	69
ams v. United States Distributing Corp., 34 S.E. 2d 244 (Va., 1945) -----	47, 50
ircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947) -----	30
merican Power & Light Co. v. S.E.C., 329 U.S. 90 (1946) -----	57
merican Seating Co. v. Bullard, 290 F. 896 (6th Cir., 1923) -----	37
erson v. Cleveland-Cliffs Iron Co., 87 N.E. 2d 384 (Ohio, 1948) -----	47, 50
erson v. International Minerals & Chemical Corp., 295 N.Y. 343, 67 N.E. 2d 573 (1946) -----	48
drews v. Precision Apparatus Inc., 217 F. Supp. 679 (S.D. N.Y., 1963) -----	41
ling v. American Tobacco Co., 72 N.J. Eq. 32, 65 A. 725 (Ch., 1907) -----	41
ackmar v. Guerre, 342 U.S. 512 (1952) -----	66
rak v. J. I. Case & Co., 317 F. 2d 838 (7th Cir., 1963), aff'd 377 U.S. 426 (1964) -----	3, 51
arke v. Gold Dust Corp., 106 F. 2d 598 (3rd Cir., 1939), cert. den. 309 U.S. 671 (1940) -----	50, 51
re Cleveland Savings Society, 25 Ohio Op. 2d 402, 192 N.E. 2d 518 (C.P. Cuyahoga County, 1961) -----	59
oper v. Woodin, 72 F. 2d 179 (D.C. Cir., 1934) -----	57
na v. American Tobacco Co., 72 N.J. Eq. 44, 65 A. 730 (Ch., 1907), aff'd 73 N.J. Eq. 736, 69 A. 223 (Ct. Err. & App., 1908) -----	41
liott, et al. v. Federal Home Loan Bank Board, 233 F. Supp. 578, 584 (S.D. Calif., 1964) -----	6



ederal Home Loan Bank Board v. Greater Delaware Valley F.S. & L. Ass'n., 176 F. Supp. 24 (E.D. Pa., 1959), aff'd. 277 F. 2d 437 (3rd Cir., 1960) -----	26, 27
C v. Pacific Power & Light Co., 307 U.S. 156 (1939) -----	31
ederal United Corp. v. Havender, 11 A. 2d 331 (Del. Sup. Ct., 1940) -----	42, 50
nch v. Warrior Cement Co., 16 Del. Ch. 44, 141 A. 54 (1928) -----	37
aser v. Great Western Sugar Co., 185 A. 60 (N.J. Ch., 1935), aff'd. 185 A. 64 (Ct. Err. & App., 1936) -----	41
iedman v. Southern Co-op. Building & Loan Ass'n., 104 Pa. Super. Ct. 514, 159 A. 80 (1932) -----	38
rrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 P. 1044 (1928) -----	37
ay v. Powell, 314 U.S. 402 (1941) -----	31, 57
reater Delaware Valley Federal S & L Ass'n. v. Federal Home Loan Bank Board, 262 F. 2d 371, 374 (3rd Cir., 1958) -----	31
nsberry v. Lee, 311 U.S. 32 (1940) -----	3
wkins v. Swan, 52 F. 2d 688 (N.D. W.Va., 1931) -----	57
cks v. Summerfield, 261 F. 2d 752 (D.C. Cir., 1958), cert. den. 359 U.S. 959 (1959) -----	66
rton v. Citizens Nat. Trust & Savings Bank of Los Angeles, 86 C.A. 2d 680, 195 P. 2d 494 (1948) -----	3
tz v. R. Hoe & Co., Inc., 278 App. Div. 766, 104 N.Y.S. 2d 14 (1st Dep't., 1951), cert. den. 342 U.S. 886 (1951) -----	41
ngfelder v. Universal Laboratories, Inc., 68 F. Supp. 209 (D. Del., 1946), aff'd. 163 F. 2d 804 (3rd Cir., 1947) -----	48, 50
bold v. Inland Steel Co., 125 F. 2d 369 (7th Cir., 1941), mod. 136 F. 2d 876 (1943) -----	37
cking v. Delano, 122 F. 2d 21 (D.C. Cir., 1941) -----	57
cArthur Liquors, Inc. v. Palisades Citizens Association, Inc., 265 F. 2d 372 (D.C. Cir., 1959) -----	66
Shan v. Sherrill, 283 F. 2d 462 (1960) -----	66
ssissippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934) -----	31, 33, 57



National Supply Co. v. Leland Stanford Jr. University, 134 F. 2d 689 (9th Cir., 1943), cert. den. 320 U.S. 773 (1943) -----	41
Is & Company v. S.E.C., 323 U.S. 624 (1945) -----	48, 50
Ich v. Webb, 336 F. 2d 153 (9th Cir., 1964), cert. den. 380 U.S. 915 (1965) -----	3
Chester Telephone Corp. v. United States, 307 U.S. 125 (1939) -----	57
n Fox Publishing Co. v. United States, 366 U.S. 683 (1961) -----	3
Wabacher v. United States, 334 U.S. 182 (1948) -----	31
E.C. v. Chenery Corp., 318 U.S. 80, 38 (1943) -----	30
E.C. v. Chenery Corp., 332 U.S. 194 (1947) -----	57
elds v. Barrow, 17 Howard (58 U.S.) 130 (1854) -----	67
tiety for Savings v. Bowers, 349 U.S. 143, 150 (1955) -----	46
re Springfield Savings Society, Case No. 60513, Court of Common Pleas of Clark County Ohio (1965) -----	60
ate of Washington v. United States, 37 F. 2d 421 (1936) -----	66
ion Financial Corp. of America v. United Investors' Securities Corp., 156 A. 220 (Del. Ch., 1931) -----	42
ited States v. Markey, 98 F. Supp. 431 (D. Montana, 1951) -----	69
ndhurst v. Central Leather Co., 101 N.J. 543, 138 A. 772 (1927) -----	41
ndhurst v. Central Leather Co., 149 A. 36, aff'd. 153 A. 402 (N.J., 1930) -----	47, 50
nsch v. Consolidated Laundry Co., 116 Wash. 44, 198 P. 383 (1921) -----	37

thorities:

me Owners' Loan Act of 1933, as amended (12 U.S.C. 1461, et seq.) -----	6, 19, 27
lifornia Savings & Loan Law, §§ 9203, 9204, 9205 -----	21, 22, 28
C.F.R. 546.4 -----	20, 28
Jur. - Corporations, Section 1544 -----	39
llantine on Corporations (rev. ed., 1946) §§ 295, et seq. -----	37

etcher Cyc. Corporation (1963 Ed.)	
§ 164	48
Fletcher, Corporations (rev. ed.,	
1961) §§ 7157-7167	37
ore's Federal Practice, Vol. 3, p. 2155	66
Pomeroy, Equity (5th ed., 1941) § 1093	37

Exhibits Received in Evidence

Exhibits 1, 2, 3, 4, 4-A, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21 and 22.
 Exhibits A, A-1, A-2, A-3, A-4, A-5, B, C,
 C-1, C-2, C-2-A, C-3, C-4, C-5, C-6, C-7,
 C-8, C-9, C-9-A, C-10, C-11, C-12, C-13,
 C-13-A, C-13-B, C-14, C-14-A, C-14-B, C-14-C,
 C-14-D, C-14-E, C-15, C-16, C-17, C-17-A,
 C-18, C-19, C-20, C-21, C-22, C-23, C-24,
 C-25, C-26, C-26-A, C-26-B, C-26-C, C-26-D,
 C-27, C-28, C-29, C-30, C-30-A, C-31, C-32,
 C-33, C-34, C-35, C-36, C-37, C-38, C-39, C-40,
 C-41, C-42, C-43, C-44, C-45, C-46, C-47, C-48,
 C-49, C-50, C-51, C-52, C-53, C-54, C-55, C-56,
 C-57, C-57-A, C-57-B, C-57-C, C-58, C-58-A, C-59,
 C-60, C-61, C-61-A, C-62, C-62-A, C-63, C-63-A,
 C-64, C-65, C-66, C-67, C-68, C-69, C-70, C-71,
 C-72, C-73, C-74, C-75, C-76, C-77, D, D-1, D-2,
 D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, E, F,
 G, G-1, G-2, G-3, G-4, G-5, G-6, G-7, G-8, G-9,
 G-10, G-11, G-12, G-13, G-14, G-15, G-16, G-17,
 G-18, G-19, H, I, J, L, M, N, P, Q, R, S, T, U,
 V and AC. (Transcript 760-761.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20378

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20447

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20522

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

EQUITABLE SAVINGS & LOAN ASSOCIATION, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS FEDERAL HOME LOAN BANK BOARD
AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

JURISDICTIONAL STATEMENT

These are appeals^{1/} by the appellants Federal Home Loan Bank Board ("Board") and Federal Savings and Loan Insurance Corporation ("Insurance Corporation") from three judgments, all substantially similar, entered by the United States District Court for the Southern District of California (Peirson M. Hall, J.) on May 17, 1965 (1R 697-761; 2R 907-971; 3R 1642-1706). The judgments were entered following the granting by the District Court of motions for summary judgments filed by the appellees in three actions instituted to have declared invalid those terms of a Merger Agreement, dated June 12, 1963, between Long Beach Federal Savings and Loan Association ("Long Beach") and Equitable Savings and Loan Association ("Equitable") which obligated Equitable to distribute 791,650 shares of its guarantee stock to Long Beach shareholder in accordance with the formula set forth in the Merger Agreement (Exh. E, pp. 44-50). The appellees, in substance, prayed for a judicial determination that the Equitable guarantee stock should be distributed on a pro rata basis rather than in the manner provided by the Merger Agreement, even though the Merger Agreement

1/ By stipulation of the parties and orders of this Court, dated November 6, 1965, the appeals have been consolidated for motion briefing and argument. References in this brief and its Appendix to the original papers in No. 20378 (D.C. No. 63-1072 PH), No. 20447 (D.C. No. 63-1230 PH) and No. 20522 (D.C. No. 63-1107 PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr.".

or to the consummation of the merger on September 10, 1963, been approved by the Board and by the California Savings and Loan Commissioner ("California Commissioner"), also an appellant, and in accordance with, respectively, federal and state law, as well as by the shareholders of Long Beach and the stockholders of Equitable. (Exhs. D1-D9.)

The first District Court action (No. 63-1072 PH) was instituted on September 10, 1963 by Long Beach and four individuals constituting the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association ("Shareholders' Protective Committee"), the latter suing as individuals, as the Shareholders' Protective Committee, and as representatives of the entire class of Long Beach savings shareholders.^{2/} The defendants in this action, described as one to quiet title and for declaratory relief, are the Board and the Insurance Corporation. Jurisdiction of the District Court was invoked under 28 U.S.C. 1331 and 1391(e) and 28 U.S.C. 1464(a), 1464(b), 1464(c), 1464(d) and 1725 (1R 3, 4).

The District Court held that the Shareholders' Protective Committee represented, with certain exceptions not relevant here, Long Beach shareholders, including those who were adversely affected by the position taken by that committee in the litigation by the District Court's judgments (1R 312-315A; 2R 407-412; 3R 312-317). The Shareholders' Protective Committee could not possibly represent shareholders who were so affected by the litigation and the judgments. Sam Fox Publishing Co. v. United States, 336 U.S. 683 (1961); Hansberry v. Lee, 311 U.S. 32 (1940); Horton v. Citizens Nat. Trust & Savings Bank of Los Angeles, 86 Cal. 2d 494 (1948). The Board has the right to and does represent the interests in this litigation of such Long Beach shareholders. Reich v. Webb, 336 F. 2d 153 (9th Cir., 1964), cert. den. 377 U.S. 915 (1965). See also Borak v. J. I. Case & Company, 317 F. 2d 838, 845 (7th Cir., 1963), aff'd. 377 U.S. 426.

On the same day the foregoing action was commenced, September 10, 1963, a similar action was filed in the California Superior Court (No. SOC 6367) by the Shareholders' Protective Committee suing in the same capacity as in the District Court action. Named as defendants were Long Beach, Equitable, John Does 1-70, the Board and the Insurance Corporation. This action was also described as one to quiet title and for declaratory relief (2R Long Beach and Equitable on October 8, 1963 attached their respective complaints in District Court action No. 63-1072 PH and District Court action No. 63-1107 PH declaring said complaints to be the respective answers, counterclaims and cross-claims in this state court action (2R 37-45). The Board and the Insurance Corporation on October 10, 1963 removed this action to the District Court (Action No. 63-1230 PH) under 28 U.S.C. 1441 and 1442(a)(1) (2R

The third action was filed on September 17, 1963 in the District Court (No. 63-1107 PH) by Equitable against the Shareholders' Protective Committee, the Board, the Insurance Corporation, Long Beach and some individual Long Beach shareholders. This action was described as one in interpleader and for declaratory relief. Equitable depositing with the Clerk of the Court the 791,650 shares of its guarantee stock which it was contractually obligated to contribute to Long Beach shareholders in accordance with the terms of the Merger Agreement. Jurisdiction of the District Court was invoked under 12 U.S.C. 1464, 1464(d), 1725, 28 U.S.C. 1331, 1335, 1397 F.R.C.P. Rule 22, and the District Court's general equity inter

vers (3R 1-17B). In this action Long Beach filed its complaint in Civil Action No. 63-1072 PH as its answer, counterclaim and cross-claim (3R 64-66). Similarly the Shareholders' Protective Committee filed its complaint in the removed state court action No. 63-1230 PH) as its answer, counterclaim and cross-claim in its third action (3R 64-66).

During the course of the proceedings below the appellant California Commissioner was added as a party defendant in Civil Actions No. 63-1107 PH and No. 63-1230 PH (2R 601-612; 3R 425a-42c) and Equitable was added as a party defendant in Civil Action No. 63-1072 PH (1R 589-590).^{3/} The California Commissioner moved to dismiss the two actions in which he had been added as a party, challenging the District Court's jurisdiction on the ground of sovereign immunity (2R 675-678; 3R 606-607). The Board of the Insurance Corporation contended that the California Commissioner was an indispensable party in all three actions and that if he was not subject to the jurisdiction of the District Court, the actions had to be dismissed (1R 369; 2R 465; 3R 358). The District Court denied the two motions to dismiss filed by the California Commissioner (2R 728-729; 3R 653-654).

Appellee N. Joseph Ross, a former large account holder at Long Beach, also intervened as a party in the three actions, taking the same position in the litigation as that of the other appellees.

The District Court, in its memorandum opinion granting appellees' motions for summary judgment and requiring distribution of the guarantee stock on a pro rata basis ruled that the California Commissioner was subject to its jurisdiction and that it had jurisdiction of the parties and the subject matter of the actions under the Interpleader and Declaratory Relief Statutes, the Home Owners Loan Act of 1933, as amended, and the Administrative Procedure Act. 28 U.S.C. 1335, 1397, 2201, 2202, 2361; F.R.C.P. 12, 22, 56(a), 57; 12 U.S.C. 1464(d)(1), 1725(c)(4); and 5 U.S.C. 1009 (1R 554, 590; 3R 1477-1512).

This Court has jurisdiction of the appeals under 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. The Facts

Commencing in 1946, Long Beach and the Board became involved in a series of controversies arising out of the action of the Board in taking over the management of Long Beach on two occasions in 1946 and 1960, pursuant to the authority granted it in the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1461 et seq.). The take-overs resulted from the Board's determinations that Long Beach had engaged in certain unsound financial operations. Whether the Board was correct or not was never adjudicated despite the rash of litigation which ensued (Exh. E, p. 16; Exh. 8, pp. 1-3).

4/ The reported decisions rendered in the course of this extensive litigation are compiled in the District Court's opinion. Elliot et al. v. Federal Home Loan Bank Board, 233 F. Supp. 578, 584 (S.D. Calif., 1964), n. 1. Except as background material the facts and issues of those controversies are not involved in the present litigation.

On February 14, 1962, a settlement agreement ("Settlement Agreement") was entered into by and among Long Beach, the Board of the Insurance Corporation,^{5/} which provided, inter alia, for the dismissal of all then pending litigation between the Board, the Insurance Corporation and Long Beach and the return of Long Beach to its private management. In addition, Long Beach was given the right, if it so chose, to liquidate pursuant to a specific plan set forth in Article XV of the Settlement Agreement, about which more will be said later, infra, pp. 34-37, (Exh. 8, pp. 43-48).

During the settlement negotiations, representatives of the Board expressed their concern that after the return of Long Beach to its private management "publicity about Long Beach's proposed liquidation might result in the influx into the Association of accounts, invested, not for the purpose of carrying out the provisions of the Home Owners' Loan Act of 1933, as amended, but to enable the depositors to participate in the distribution of Long Beach's net worth, which would dilute the interests of the bona fide Long Beach shareholders." (Wilfand affdvt., 3R 1373). Long Beach was a mutual association owned by its savings account holders rather than by the stockholders as in a stock association such as a bank. The book net worth of Long Beach as of the year ending December 31, 1961 exceeded \$7 million (Exh. E, p. 22).

While the Insurance Corporation, the operations of which are controlled by the Board, is also an appellant, it has no real part to play in the present controversy.

A basis for concern was "increased savings account activity during the period of negotiations (McMurray affdvt., 3R 999). The Board's then General Counsel suggested that only persons who had been Long Beach members on April 22, 1960, the date the Board took over management of Long Beach and when savings accounts amounted to \$95 million, be permitted to again become members to share in the contemplated liquidation, and distribution of their worth (Wilfand affdvt., 3R 1373). Mr. Thomas A. Gregory, the President of Long Beach, objected because he said that many persons in the Long Beach community had contributed to the growth of the Association, though they may not have been members on April 22, 1960. He stated they should also be permitted to become members (Wilfand affdvt., 3R 1373). The suggested restriction was not incorporated in the Settlement Agreement upon Long Beach's assurance that "Long Beach had never solicited accounts outside the Long Beach area and had never sought large accounts; that all new accounts would be screened to see to it that only local persons became members; and that unduly large accounts would not be accepted." (Wilfand affdvt., 3R 1373). Mr. Gregory, Long Beach President, denied having given any such assurance to the Board (Gregory affdvt., 3R 1146).

Pursuant to the Settlement Agreement Long Beach was returned to its private management on April 2, 1962 (Exh. E, p. 16; McMurray affdvt., 3R 1000). At that time savings (share) accounts in Long Beach totalled about \$30,500,000 (McMurray affdvt., 3R

the day of the return, April 2, approximately \$24 million was deposited in Long Beach (McMurray affdvt., 3R 1000). As of April 30, 1962, Long Beach savings accounts had climbed to about \$5,800,000 (Exh. 6 to McMurray affdvt., 3R 1021). From then until November 30, 1962 the net increase in savings accounts was approximately \$5,700,000, the total of all accounts amounting to about \$71,500,000 on November 30, 1962 (Exhs. 7-13 to McMurray affdvt., 3R 1027-1074).

In the meantime, the Long Beach management in May 1962 had formally submitted to the Board a proposed plan of merger between Long Beach and Equitable (Exhs. C-1, C-2, C-3). In early July 1962, the negotiations were proceeding in connection with the merger proposal. Mr. Gregory, the President of Long Beach and the principal negotiator for Long Beach and perhaps for Equitable,^{6/} advised the Board about large withdrawals which had been made from Long Beach, after the payment of the June 30, 1962 dividend, by one Mr. Louis Boyar and some of his associates (McMurray affdvt., 3R 1000; Stanaland affdvt., 3R 1376).^{7/} At the Board's request, Mr. Gregory

Mr. Gregory was the beneficial owner of a substantial block of Equitable stock during the entire period of the merger negotiations (Exh. E, p. 10). In addition, his name was carried on Equitable's stationery as vice-president as late as June 20, 1963 (Exh. C-58). Mr. Gregory's sister, Mrs. Carolyn Stanaland, was the owner of a much larger block of Equitable stock (Exh. E, pp. 10, 15).

Mr. Boyar and many of these associates were also investors in Equitable stock. (Exhs. C-15, E-15, 3R 1191, 1215.)

submitted a list of accounts of \$100,000 or over which had been opened at Long Beach on and after April 2, 1962 (McMurray affdvt. 3R 1000; Wilfand affdvt., 3R 1376; Exhs. C-5, C-6, C-15). That list showed that 77 such accounts, totalling in the aggregate about \$20,500,000, had been opened by, according to Mr. Gregory's characterization, "celebrities of the financial and entertainment world widely known for their great wealth and business acumen" (Gregory affdvt., 3R 1139)^{8/}. This situation was in marked contrast to the situation on April 22, 1960, when Long Beach, with an aggregate total of savings accounts of approximately \$96 million, had only one account in excess of \$100,000 (McMurray affdvt., 3R 1001). A later analysis of Long Beach accounts which increased by \$10,000 or more between April 2, and November 30, 1962, made from data supplied by Long Beach (Exhs. C-29, C-29A), revealed equally marked contrasts in old and new account holdings in the \$20,000 - \$100,000 range. In April 1960 when Long Beach had on deposit more than \$96 million there was only one account in the \$75,000 - \$100,000 range. In the period April 2, 1962 - November 30, 1962 there were six such accounts, none of the owners of which had previously been Long Beach shareholders. In April 1960 there were no accounts in the range of \$50,000 to \$75,000. In the period April 22, 1962 - November 30, 1962 there were 34 such accounts.

^{8/} Approximately \$10 million of such accounts were withdrawn at the June 30, 1962 dividend (Exh. C-5, C-6, C-15).

the shareholders owning these deposits only two had previously in shareholders of Long Beach. Their balances as of April 2, 1962 are not known to the appellants. In April 1960 there were 124 accounts on deposit in the range of \$20,000 to \$50,000. In the period April 2, 1962 - November 30, 1962 there were 124 such accounts and of these account holders 18 had previously been shareholders in Long Beach. Again, their account balances as of April 2, 1962 are not known to the appellants (Exhs. 18 and 19 to McMurray affdvt., 3R 1095-1098, Exh. R).

This influx of large accounts into Long Beach, most of which were opened by persons having no prior connection with Long Beach, was of grave concern to the Board (McMurray affdvt., 3R 1001-1002; Exh. R). Equally of concern was the fact that of the aggregate total of more than \$28 million in accounts which had increased by \$4,000 or more between April 2, 1962 and November 30, 1962, over 1 million of such accounts were pledged as of November 30, 1962, to secure loans, the principal pledgee being the City National Bank (formerly the City National Bank of Beverly Hills) which as of November 30, 1962, had outstanding loans of over \$8 million, the proceeds of which loans had been deposited in Long Beach (McMurray affdvt., 3R 1001; Exh. R)^{9/}. The inference is plain that the new shareholders were motivated by some consideration other than the financial return earned on savings accounts and the existence of Federal savings and loan account insurance.

Mr. Hart, the President of the City National Bank, was a substantial stockholder in Equitable as was one of its officers, Curtis (Exh. E, p. 10; Exh. C-29).

The effect of this tremendous influx into Long Beach of new money in large sums, much of it borrowed for the purpose, was to dilute the interests of the small and regular shareholders in the Long Beach net worth in the event the liquidation plan of Article XV of the Settlement Agreement were followed. A similar consequence would, of course, ensue if there should be a merger and stock distribution rather than a liquidation.^{10/} It should also be pointed out, because of this sudden and large inflow, Long Beach was in no position to invest the new money quickly, yet had to pay a high dividend rate to the new savers (the rate ranged from 4.5% to 4.8%). As a consequence Long Beach operated at a loss of over \$100,000 per month during the period January 1, 1963 to September 10, 1963 and this in turn reduced its net worth (Wilford affidavit., 3R 1378, 1379).

^{10/} The extent of the dilution, had the Board approved a pro rata distribution of Equitable stock in connection with the merger, is set forth in Long Beach's proxy statement (Exh. E, pp. 4, 5). Under the Merger Agreement formula (infra, p. 14), the proxy statement reads, ". . . there is about \$53,000,000 in Long Beach share accounts eligible to participate in the distribution of the 791,650 shares of Equitable stock, so that one share of Equitable stock would be distributed for approximately each \$67 of a member's eligible account balance. . ."

". . . The total amount of share account balances . . . excluded on November 30, 1962 was approximately \$19,000,000, or about 26% of total share account balances on that date. Without such conclusion, one share of Equitable stock would be distributable for approximately each \$91 of a member's account balance in Long Beach as of November 30, 1962."

Faced with what it regarded as a breach of fiduciary duty^{11/}
the Long Beach management in permitting such a tremendous in-
flux of new money of this sort,^{12/} the Board took the position during
merger negotiations that it would not approve a pro rata dis-
tribution of Equitable stock to Long Beach shareholders (C-42,
3). To do so would have permitted the speculating depositors,
including those who even Mr. Gregory himself characterized as
probably temporary investors,^{13/} to share in Long Beach's net worth
which they had contributed nothing,^{14/} Long Beach and Equitable

The statement in the District Court's opinion that no claim
made of "crime, fraud, illegality, or other wrongdoing"
against either Long Beach, Equitable or the officers or directors
either (233 F. Supp. at p. 583) is incorrect. The Board's
power specifically set up the breach of fiduciary duty by the
Long Beach management (1R 373-374; 2R 468-469; 3R 369-370), a
position which was also taken in the Board's memoranda below
(981, 1355). See also the affidavit of the then Board chairman
support of the Board's motion for summary judgment (3R 1002).

The District Court's statement that the Long Beach management
had no power to prevent such an influx (233 F. Supp. at p. 594) is
entirely in error. The Long Beach by-laws (Exh. 19, §§ 6(e), 6(f))
explicitly grant management such power.

Mr. Gregory's letter of July 25, 1962 (Exh. C-6) reads, "The
investors opening accounts of \$100,000 or more after 4/2/62, who
were not withdrawn up to July 8, 1962, total \$10,000,000. We are
convinced that approximately \$7,000,000 of these accounts have been
deposited to banks, which might indicate the accounts are of a
temporary nature."

The District Court refused to allow the Board during discovery
proceedings to inquire into the status of the accounts of these
large investors after September 10, 1963 (Tr. 368-371, 377-380,
385-395; 3R 598-600, 698-709). The Board wished to show that most,
if not all, of those investors had closed their accounts promptly
shortly after their rights to share in the Equitable stock dis-
tribution had become fixed. This was the date the merger was
summed up, September 10, 1963.

finally agreed to insert in the merger agreement the distribution provisions which were struck down by the District Court (Exhs. C-51, 52). These provisions read (Exh. E, pp. 47-48):

"Long Beach has required waivers of participation rights for all additions to savings accounts and for all new savings accounts after November 30, 1962. Each member's share account balance or balances as of that date shall be reduced by (1) the amount of any Long Beach share loan as of November 30, 1962 and/or the amount, as shown by the Long Beach books and records, for which each such share account was pledged or assigned, as of November 30, 1962, to any other person, (2) withdrawals from each such account subsequent to November 30, 1962, the last in, first out rule being applied to such withdrawals, and (3) the amount by which the total remaining balance or balances exceeds the sum of (a) \$10,000 and (b) the balance or balances, if any, in such member's account or accounts on April 22, 1960.

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein.

"Long Beach and Equitable agree that no withdrawals made after the effective date of the Merger shall affect the right of any Long Beach shareholder hereunder as vested on said date, and said shareholders so withdrawing shall participate as fully as if such withdrawal had not been made.

"Each officer and director of Long Beach and Equitable shall participate in the distribution only to the extent of his respective share account as of April 22, 1960 and shall furnish an affidavit to the Federal Home Loan Bank Board to the effect that he is not participating directly or indirectly in the distribution of Long Beach, except to the extent set forth in the proxy Statement.

"Members of the Shareholders' Protective Committee, attorneys representing Long Beach, Equitable or the Shareholders' Protective Committee and close relatives of such persons, and close relatives of officers and directors of Long Beach and Equitable and corporate entities controlled by any of them, shall not participate in the distribution of stock as herein contemplated, except to the extent of the balances of such members' accounts in Long Beach as of April 22, 1960. Close relatives shall be deemed to mean spouses, children, parents, brothers, sisters, nephews, nieces and anyone married to one of the foregoing persons."

Briefly summarized, the distribution provisions denied participation rights in the Equitable stock with respect to that portion of new accounts, or additions to April 22, 1960 account balances, in excess of \$10,000 and with respect to pledged accounts to the extent of the pledge.^{15/} In addition, it restricted various "insiders" from participating in the distribution except to the extent of their April 22, 1960 account balances.^{16/} The

Even Mr. Gregory, in his letter of July 25, 1962 (Exh. C-6), seemed to concede the fairness of the restriction with respect to pledged accounts when he said, "Since the Association [Long Beach] has, secured by its share accounts are deducted perhaps other gains made on the security of such share accounts should be designated as a matter of equity."

For appellees' account of the background leading to the deposit of these large sums see infra, pp. 51-53.

Under the District Court's judgment such "insiders" acquired participation rights to the full extent of their account balances, even though Long Beach in its letter of December 2, 1962 to the Board (Exh. C-16) stated, "The participation of the officers and directors of Long Beach and Equitable in the distribution of the surplus, reserves and undivided profits of Long Beach upon merger with Equitable will be limited to the amounts of their respective accounts in Long Beach as of April 22, 1960, the date the Association was seized."

\$10,000 figure was selected because it is the maximum amount of federal account insurance; the Board believed that generally new accounts would not be opened by bona fide savers in amounts larger than \$10,000 in any one account (McMurray affdvt., 3R 1002).

The Merger Agreement with the restrictive distribution provisions was executed by Long Beach and Equitable on June 12, 1963 (Exh. C-52). The Board conditionally approved it on June 14, 1963, the conditions being formal and technical (Exh. C-56). The Long Beach management shortly thereafter mailed the proxy statement, including copies of the Merger Agreement (Exh. E), to its members with its letter dated June 17, 1963 (Exh. C-57). The Long Beach members approved the Merger Agreement overwhelmingly at their meeting on July 6, 1963 (Exhs. C-59, C-59A, C-60). The Equitable stockholders thereafter voted their approval, and the California Commissioner granted his approval (Exh. C-64). The Board's final approval was given on September 5 (Exh. C-67) and on September 10, 1963, the merger was consummated (Exhs. D-1, D-10). To that point no proceedings of any sort had been instituted to enjoin the merger or to test the validity of the approved provisions with respect to the distribution of Equitable stock.

2. Proceedings in the District Court

As set forth above, supra, pp. 3 - 6 , the challenge to the distribution terms of the Merger Agreement was initiated immediately after the merger was consummated on September 10, 1963. On October 28, 1963 a stipulation was entered into by the parties

oved by and filed in the District Court on October 29, 1963
orizing distribution of 585,821 of the 791,650 shares of
table guarantee stock to those former Long Beach shareholders
he extent their accounts were unaffected by the restrictive
tribution provisions of the Merger Agreement (3R 167-179).
District Court's order effectuating the terms of the stipu-
on became effective on December 10, 1963 (3R 180-190, 309-311^{17/}).
ownership of the remaining 205,829 shares is in dispute and
ne District Court judgments are upheld, these shares, con-
uting 26% of the total, will be distributed to the speculating
stors who for the most part, insofar as the record discloses,
acting on the basis of what might be termed "inside information"^{18/}.
Following the filing of further pleadings in the three
ons and after some discovery, as limited by the District
t (see footnote 14, supra, p. 13), and an abortive pre-
l hearing on May 20-21, 1964 (Tr. 539-581), the District
t directed the parties to file cross-motions for summary
gment (Tr. 581-606). The motions were filed on June 8, 1964
argued on June 22-23, 1964 (3R 874-1361, 1371-1413; Tr. 613-
). The District Court filed its Memorandum Opinion on
ember 22, 1964 (1R 553-588; 3R 1477-1512) and its judgments

Judicial notice may be taken of the fact that the most recent
rt, dated July 25, 1966, filed by Equitable in the District
t with respect to the stipulated distribution shows that as
uly 22, 1966, 465,214 shares, 79.41% of the 585,821 shares,
een distributed to eligible former Long Beach shareholders.

See infra, pp. 51-53.

on May 17, 1965 (1R 697-761; 2R 907-971; 3R 1642-1706). The Board and the Insurance Corporation filed their notices of appeal on July 9, 1965 (1R 828-829; 2R 1019-1021; 3R 1765-1767). The District Court, on September 8, 1965, denied the motion of the Board and the Insurance Corporation for a stay of the District Court's judgments pending appeal (1R 820-825; 2R 1079-1085; 3R 1838-1844). This Court, by order dated November 18, 1965, granted a stay pending appeal.^{19/}

^{19/} Appellees' petition for an order fixing attorneys' fees was heard by the District Court on June 23-25, 1965. Its memorandum opinion with respect to this matter was filed on July 25, 1966. A copy thereof is reproduced in the Appendix, pp. 53a - 80a.

3. The District Court Decision

The District Court held:

(a) That the restrictive provisions of the Merger Agreement respect to the distribution of Equitable guarantee stock to Long Beach shareholders were contrary to law, the Long Beach Charter and the Settlement Agreement and were therefore a nullity.

(b) That it had the power to change the distribution terms of the Merger Agreement and to order pro rata distribution of the Equitable guarantee stock to the Long Beach shareholders.

(c) That the Board had agreed to be, and was, bound by the decision of the District Court and, in any event, since the distribution terms of the Merger Agreement were a nullity, the Board had no further function to perform.

(d) That the California Savings and Loan Commissioner was subject to suit in the District Court and was bound by the District Court judgment.

(e) That the appellees were not estopped from challenging the validity of the distribution provisions of the Merger Agreement.

(f) That there was no genuine issue as to any material fact and that the appellees were entitled to judgment as a matter of law.

4. Statutes and Regulations Involved

(a) Section 5(d)(2) of the Home Owners' Loan Act (12 U.S.C. § 5(d)(2)) reads:

"The Board shall have the power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations . . ."

(b) The applicable federal regulation is 12 C.F.R. 546.4

which reads:

"The Board of directors of any Federal association may propose a plan for the dissolution of such association. Such plan may provide for (a) the Federal Savings and Loan Insurance Corporation to be appointed, in accordance with the provisions of Section 406 of the National Housing Act, as amended, and section 5, Home Owners' Loan Act of 1933, as amended, and pertinent regulations of such corporation, as receiver for the purpose of liquidation; (b) all assets of the association to be transferred to another thrift and home-financing institution under Federal or State charter for a sufficient amount of cash to pay all obligations of the association and to retire all outstanding share accounts up to the amount credited thereto; (c) the transfer of all assets to another thrift and home-financing institution under Federal or State charter in consideration of the payment of all outstanding obligations of the association and the issuance of share accounts or other evidence of interest to the members of the Federal association on a pro rata basis; or (d) dissolution in such other manner as may be proposed by the directors and which to them appears to be to the best interest of all concerned. Such plan shall thereupon be submitted to the Board for approval, together with a statement of the reasons for proposing dissolution and the reasons for the plan submitted. If it appears to the Board that dissolution is advisable and that the plan of dissolution submitted is in the interest of all concerned, the Board will approve the plan; if the plan submitted appears to be inadvisable, the Board will either make recommendations to the association concerning the plan or disapprove it. When a plan of dissolution has been approved by the board of directors of a Federal association and by the Board, such plan shall be submitted to

the members of such association at a duly called meeting and, when approved by a majority of the votes cast at such meeting, shall become effective. When dissolution has been consummated in accordance with the plan approved by the Board, a certificate evidencing that fact, supported by such evidence as the Board may require, shall forthwith be filed with the Board. Upon receipt of evidence satisfactory to the Board that such dissolution has been so consummated, the Board will terminate the corporate existence of the dissolved Federal association and its charter shall thereby be cancelled." (Emphasis supplied)

(c) The applicable California statutes are incorporated in the following sections of the California Financial Code relating to Savings and Loan Associations:

Section 9203: MERGER AND CONSOLIDATION OF DOMESTIC AND FEDERAL ASSOCIATIONS.

Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them.

Section 9204: TRANSFER OF ENGAGEMENTS, FUNDS, AND PROPERTY TO FEDERAL ASSOCIATION; RATIFICATION OF AGREEMENT BY STOCKHOLDERS AND SHAREHOLDERS.

... any federal savings and loan association may transfer its engagements, funds, and property, in whole or in part, to any domestic association, upon such terms as may be agreed by the affirmative vote of at least a majority of their respective directors, ratified, in the case of the contracting domestic association by the vote or written consent of stockholders holding in the aggregate more than two-thirds of the outstanding stock and by the vote or written consent of shareholders holding in the aggregate more than two-thirds in value of the outstanding shares, and in the case of a contracting federal

savings and loan association by the consent, in writing or by vote, prescribed by the laws of the United States and the regulations of the Federal Home Loan Bank Board applicable thereto.

Section 9205: APPROVAL OF COMMISSIONER;
COMPLIANCE WITH FEDERAL LAW.

Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, and with respect to any constituent domestic association be made in conformity with the provisions of law applicable to mergers, consolidations, and transfers in the case of corporations generally, and with respect to any constituent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations and transfers.

5. Specification of Errors

The District Court erred:

(a) In holding that it had the power to change the distribution terms of the Merger Agreement and to order distribution of the Equitable guarantee stock to the Long Beach shareholders on a pro rata basis (3R 1803).

(b) In failing to hold that appellees should have sought injunctive relief prior to the consummation of the merger (3R 1803).

(c) In holding that the distribution terms of the Merger Agreement with respect to the Equitable guarantee stock were null and void (3R 1803).

(d) In failing to find that the officers and directors of Long Beach breached their fiduciary responsibilities to their shareholders.

encouraging and permitting the large influx of speculative accounts into Long Beach on and after April 2, 1962 (3R 1803).

(e) In failing to uphold as valid and reasonable the distribution terms of the Merger Agreement as approved by the Board of the California Commissioner (3R 1803, 1804).

(f) In failing to dismiss the actions on the ground that the California Commissioner was an indispensable party who was not subject to suit in the District Court (3R 1803).

(g) In limiting the Board's right of discovery with respect to ascertaining account activity at Equitable after consummation of the merger on September 10, 1963 with respect to those former Long Beach shareholders whose participation rights to Equitable warrant stock were restricted by the distribution terms of the Merger Agreement (3R 1803).

(h) In holding that the Shareholders' Protective Committee adequately represented those Long Beach shareholders unaffected by the restrictive distribution terms of the Merger Agreement and not adversely affected by the District Court's judgments (3R 1803).

(i) In granting summary judgment against the Board and the Insurance Corporation and in favor of the appellees (3R 1804).

(j) In failing to grant summary judgment for the Board and the Insurance Corporation (3R 1804).

SUMMARY OF ARGUMENT

I. The District Court undertook to reform a Merger Agreement which had been previously approved by all the necessary parties as well as by the Federal Home Loan Bank Board and the California Savings and Loan Commissioner, as required by federal and state law. The District Court had no power to rewrite the Merger Agreement, and to by-pass the regulatory agencies which alone were empowered by federal and state legislative bodies to regulate mergers of savings and loan institutions.

II. The only relief available to the aggrieved shareholders of Long Beach was to enjoin the merger. Although fully advised of the intent to merge months in advance of the actual consummation the aggrieved shareholders waited until the consummation took place to file their actions. At that time the only remedy available was an action to set aside the merger, but even if the present complaint could be so construed, the aggrieved shareholders are barred by laches, they having with full knowledge of the facts delayed filing suit to the prejudice of many innocent parties.

III. The Merger Agreement, in all events is valid. The charter provision upon which the District Court relies relates to liquidation, dissolution or winding up of the Association, and provides that in such event the net assets shall be distributed pro rata. The merging of Long Beach with Equitable, a state savings and loan association, is not a liquidation, dissolution or winding up of the association, and the authorities so hold. Even if the

rary were true, the Merger Agreement would be valid if it
found by the Court to be fair -- though in conflict with
charter. The merger provisions here under attack were de-
signed to exclude from participation in the distribution of
equitable stock last minute speculators who had contributed
nothing to the establishment of Long Beach's net worth as a
major concern.

IV. The California Savings and Loan Commissioner by state
law is required to pass upon and approve all mergers of state
savings and loan associations. Therefore, he is an indispensable
party to any action attacking a merger subject to his control.
The California Commissioner is not subject to the jurisdiction
of the federal District Court in these proceedings, and the
actions should have been dismissed because of the absence of an
indispensable party.

ARGUMENT

- I. THE DISTRICT COURT HAD NO POWER TO CHANGE
THE DISTRIBUTION TERMS OF THE MERGER AGREE-
MENT AND, AS APPELLEES REQUESTED, TO ORDER
DISTRIBUTION OF EQUITABLE STOCK ON A PRO
RATA OR ANY OTHER BASIS.

- A. The Governing Statutes and Regulations

Notwithstanding that none of the parties contended below that
Section 5(i) of the Home Owners' Loan Act of 1933, as amended (12
U.S.C. 1464(i)), was applicable, the District Court, without the
benefit of any briefing or argument, concluded that, in the
creation and implementation of the Merger Agreement, "the Board

and the Association were proceeding under the provisions for merger and dissolution by vote of the shareholders [second unnumbered paragraph of 12 U.S.C. 1464(I)], which does not require approval of the Board [Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings & Loan Association, et al. (3rd Cir., 1960) 277 F. 2d 437], and not under the provisions set forth in the third unnumbered paragraph of that subsection upon such 'equitable' basis as may be approved by the Bank Board." (233 F. Supp. at p. 592). The District Court was plainly in error in so concluding.

In the first place, as the lower and appellate court opinions in the very case cited by the District Court in reaching its erroneous conclusion show, Section 5(i) of the Home Owners' Loan Act deals, not with mergers, but with conversions. Federal Home Loan Bank Board v. Greater Delaware Valley F. S. & L. Ass'n., 233 F. Supp. 24 (E.D. Pa., 1959), aff'd. 277 F. 2d 437 (3rd Cir., 1960). A merger, as in the instant case, involves two or more entities; a conversion relates solely to one entity, the charter of which is being changed either from federal to state or state to federal. In the second place, as the lower court opinion in Greater Delaware Valley makes clear, the second unnumbered paragraph of Section 5(i) with respect to which Board approval is not required, relates to conversion from a federal mutual to a state mutual association.

20/ The 6th proviso of the second unnumbered paragraph of Section 5(i) reads: "(6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on an equitable basis in the assets of the association in exact proportion to their relative share or account credits."

5 F. Supp. at pp. 29, 32). Here, even if conversion were
etched to include mergers, the "conversion" would have been
m a federal mutual into a state stock association, the latter
ng the resulting or surviving institution. Since the saver-
pers in a stock association do not participate on a mutual
as with the stockholders, as the 6th proviso of the second
numbered paragraph of Section 5(i) demands, such a "conversion"
uld have been effected only under the third unnumbered paragraph
Section 5(i), "upon an equitable basis" and with Board approval.
General Home Loan Bank Board v. Greater Delaware Valley F. S. & L.
Ass'n., 176 F. Supp. at p. 32. See 12 C.F.R. 546.5 for the
applicable Board regulation in this area. In short, Section 5(i)
the Home Owners' Loan Act has no application here, and if it
d, the third unnumbered paragraph of that Section would have
plied under which the Board would have had to approve the "con-
sion" after finding that it was on an equitable basis.

The governing federal statute, as to which there was no
pute below and which was never mentioned in the District Court
ion, is that portion of Section 5(d)(2) of the Home Owners'
a Act (12 U.S.C. 1464(d)(2)) which reads:

"The Board shall have the power to make
rules and regulations for the reorgani-
zation, merger, and liquidation of
Federal associations . . ."

The applicable federal regulation, as to which again there
no dispute below and which again was never mentioned in the

District Court opinion, is 12 C.F.R. 546.4 cited in full (infra
pp. 20 - 21) provides in part, as follows:^{21/}

"The Board of directors of any Federal association may propose a plan for the dissolution of such association. Such plan may provide for . . . (d) dissolution in such other manner as may be proposed by the directors and which to them appears to be to the best interest of all concerned. Such plan shall thereupon be submitted to the Board for approval, together with a statement of the reasons for proposing dissolution and the reasons for the plan submitted. If it appears to the Board that dissolution is advisable and that the plan of dissolution submitted is in the interest of all concerned, the Board will approve the plan; if the plan submitted appears to be inadvisable, the Board will either make recommendations to the association concerning the plan or disapprove it. . ."

While the District Court made no mention of California law §§ 9203 and 9204 of the Financial Code (infra, p. 21) authorizing mergers between a federal association and a California-chartered stock association, if authorized by a majority of the directors and if approved by holders of more than two-thirds of the outstanding stock of the state association. In addition, under Section 9205 (infra, p. 22), such mergers must be approved by the appellant California Commissioner.

^{21/} The Board then had no regulations explicitly applicable to merger between a federal association and a state-chartered institution where the latter is to be the resulting or surviving association. See 12 C.F.R. 546.1 - 546.3 (Rev. as of January 1, 1963). It was for that reason that 12 C.F.R. 546.4 was employed by the Board and by Long Beach as the regulatory channel through which the instant merger was processed.

The procedures prescribed by the applicable federal and state law, as set forth above (supra, pp. 20-21), were followed here. Long Beach management submitted to the Board for approval, pursuant to and in accordance with 12 C.F.R. 546.4 (Exh. E, p. 46, Ex. C-2, p. 3), the Merger Agreement which had been executed by duly authorized officers of Long Beach and Equitable and which obtained the distribution provisions struck down by the District Court. The Board granted its approval of the Agreement as submitted and the Long Beach members thereafter overwhelmingly voted their approval of the same. Similar action with respect to the executed Merger Agreement was taken pursuant to California law by Equitable management, the Equitable stockholders and the California Commissioner.

B. The District Court Action was Taken
Without Obtaining The Necessary Approvals

Notwithstanding the controlling statutes and regulations, the District Court did not limit itself to declaring null and void the allegedly illegal distribution terms of the Merger Agreement and granting such relief, if any, as would have been appropriate in light of such statutes and regulations. On its own, it revised the Merger Agreement. This it did by in effect striking therefrom the distribution terms which had received the approval of the federal and state supervisory authorities and of the Long Beach members and Equitable stockholders, and substituting for such terms provision for a pro rata distribution which had not received the

supervisory and other approvals required by statute and regulation. Having thus reformed the Merger Agreement to its liking, the District Court proceeded to order distribution of the Equitable stock in accordance with its revisions.

Manifestly, the District Court had no power to disregard the controlling statutes and regulations. With respect to the appeal of the Board, Congress in Section 5(d)(2) of the Home Owners' Loan Act delegated to the Board, and not to the courts, the power to regulate mergers. Under the applicable regulation (12 C.F.R. 546.4), the approval of the Board is an essential prerequisite to the effectuation of a merger. Though the courts may in appropriate circumstances determine the legality of provisions of a particular merger agreement, they are not empowered to supply the necessary administrative actions by way of approval or disapproval. As the Supreme Court has said in S.E.C. v. Chenery Corp., 318 U.S. 80, (1943):

" . . . if an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate [or trial] court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

The Supreme Court on a later occasion articulated the foregoing principle as follows (Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752, 767 (1947)):

"Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination."

See also Schwabacher v. United States, 334 U.S. 182 (1948); v. Powell, 314 U.S. 402 (1941); FTC v. Pacific Power & Light, 307 U.S. 156, 160 (1939); Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934); Greater Delaware Valley General S&L Ass'n. v. Federal Home Loan Bank Board, 262 F. 2d 371, 4 (3rd Cir., 1958).^{22/}

C. The Necessary Administrative Approvals to the District Court's Formula Were Not Supplied Either in the Approved Merger Agreement or in The Settlement Agreement of February 14, 1962.

1. The District Court seemed to take the position in its opinion (233 F. Supp. at pp. 594, 596-7) that the Board granted the necessary approval to the Court's revised "agreement" because of the following provision in the approved Merger Agreement (Exh. 47):

"This agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such

2. The same principles would necessarily govern with respect to the approvals of the California Commissioner and of the Long Beach members and Equitable stockholders in connection with the District Court's revised merger "agreement".

rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or ^{23/} any part thereof, incorporated herein."

It is difficult to understand how the foregoing provisions could be construed by anyone as an abandonment by the Board of its statutory and regulatory responsibilities and the delegation of such duties to the courts. In the first place, the Board (though implicitly approving the existence of this particular provision by approving the Merger Agreement as a whole) was not a party to the Agreement. It is no more contractually bound by quoted provision than by the many other provisions of the Merger Agreement. Secondly, the provision is nothing more nor less than a restatement of the law. The most that it says is that the contracting parties (Long Beach and Equitable) have made no agreement which would prohibit any aggrieved Long Beach shareholder from exercising such rights as he may have (and he may have none) to contest the validity of the Agreement or any part thereof. Any aggrieved shareholder would, of course, have had such right even in the absence of such a provision. The provision likewise could not alter existing law as to the extent and manner of exercise of a shareholder's rights or the relief to which he might be entitled. Thirdly, even if the Board had intended to be bound contractually

^{23/} This provision was inserted in the Merger Agreement at the request of the Shareholders' Protective Committee and Long Beach and not, as the District Court seems to suggest (233 F. Supp. at p. 596), at the Board's request. See appellees' proposed findings 42 (3R 1203).

the provision and the provision could reasonably be read as a delegation by the Board to the courts of its administrative duties and responsibilities in this regard, such delegation would have been a nullity. See Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934).^{24/}

2. Nor does the Settlement Agreement of February 14, 1962 have any application here. It is true that Article XV of that agreement (Exh. 8, pp. 43-48) contained the Board's approval^{25/}

A so-called memorandum of understanding from Mr. McMurray, Board Chairman, to Mr. Gregory, President of Long Beach, dated May 30, 1963 (Exh. C-44) makes it abundantly evident that the Board was not abdicating its responsibilities. That memorandum, so far as pertinent here, reads:

"For your information, it is the Board's position that, insofar as it is concerned, no Long Beach Shareholder who abstains from voting on the plan at the meeting of Long Beach members will be prejudiced in any way by such abstention in the event action should be instituted against the Board, et al. attacking the validity or merits of the plan, in whole or in part. The Board will otherwise employ every legal defense available to it to defend the plan's validity and its merits. The Board believes that, since the plan will have been proposed by the management of Long Beach, and approved by Long Beach members, Long Beach Federal will necessarily have to defend the plan or take a neutral position. To do otherwise would be inconsistent with the action of its management and with the vote of its members approving the plan." (Emphasis supplied)

The Settlement Agreement does not, of course, in any way involve the appellant California Commissioner or constitute his approval of anything.

of the liquidation plan specifically described therein, a plan which did provide for a pro rata cash distribution of Long Beach surplus. As will be shown below, Board approval was granted on for that plan and, more specifically, no Board approval was granted in the Settlement Agreement for a merger between Long Beach and Equitable requiring pro rata distribution of stock received from the surviving association.

The District Court at several points in its opinion equated the Article XV liquidation plan to a merger between Long Beach and Equitable (233 F. Supp. at pp. 584, 585, 586, 594) and seemed to conclude that pro rata distribution was therefore required. An examination of Article XV demonstrates that there is no merit in the Court's supposition.

The Article XV liquidation plan provided for the transfer of Long Beach savings accounts to Equitable which, in turn, was to assume liability therefor. In consideration of such assumption of liability, Long Beach was to transfer to Equitable an equal amount of Long Beach assets. The remaining assets of Long Beach after payment or provision for payment of creditor claims, were to be distributed, either directly by Long Beach or through a trust, to Long Beach shareholders on a pro rata basis. Obviously this approved liquidation plan was far different from the consummated merger between Long Beach and Equitable. Under the merger, all, and not part, of Long Beach assets and liabilities were transferred to Equitable. Long Beach shareholders, under

merger, were to receive payment for Long Beach's value as a
long concern, not from the proceeds of the liquidation of Long
Beach assets, but by way of the distribution of Equitable guarantee
check to them. These are the principal differences in the two
plans; see Exhibits C-21, C-22, C-26, C-30, C-33, C-34, C-35, C-50
for a detailed listing of other differences.

Again, if the Article XV liquidation plan, already approved
by the Board, were indeed the same as a merger between Long Beach
and Equitable, Long Beach would not have sought Board approval of
the merger and spent from May 1962 to June 1963 negotiating with
the Board with respect to the terms of the merger. Yet, this is
precisely what it proceeded to do. And the fact of the matter is
that Long Beach, in the last paragraph of Article XVII of the
Merger Agreement, expressly recognized that the Merger Agreement
was not an implementation of the Article XV liquidation plan but
an alternative to it (Exh. E, p. 51). ^{26/}

This paragraph reads:

"Each Association does hereby reserve, pending consummation hereof, all rights and agreements between the parties pertaining to carrying out the purposes and intent of Article XV of that certain Settlement Agreement made between the Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation and Long Beach Federal Savings and Loan Association dated February 14, 1962, and each Association specifically agrees that in the event, for any reason, the within Merger Agreement not be consummated, that each Association shall be bound by the agreements between the Associations pertaining to said Article XV and shall exert every effort to consummate the same."

Finally, it must be remembered that Long Beach was not contractually, or otherwise, bound to follow the Article XV plan. It had the right to do so, if it so chose. But, apparently believing that the merger route was preferable to the liquidation plan, for tax and other reasons, it voluntarily chose the former. Plainly once the Article XV liquidation plan was abandoned by Long Beach, as it had a right to do, and the merger plan proposed, the Board had the statutory and regulatory duty to examine into all existing facts, terms and circumstances to determine whether and on what basis the merger should be approved. Those facts and circumstances (supra, pp. 9-11) had changed markedly since the execution of the Settlement Agreement. They disclosed a rapid abnormal increase in large savings accounts resulting from investments by persons with no prior account holder connection with Long Beach and under circumstances plainly establishing a breach of fiduciary duty by the Long Beach management. This influx of large accounts into Long Beach only served to dilute the interests of the other Long Beach shareholders. Because of these changed circumstances, the Board, to effectuate its statutory and regulatory responsibilities, could have either rejected the merger as unfair and inequitable under the prevailing circumstances or approved upon the basis of a different and equitable formula which provided for the distribution of Equitable stock on other than a pro rata basis. It chose the latter course of action, and both associations presented that plan to their shareholders and the California

missioner for approval. Manifestly, the District Court was in error in its seeming assumption that the pro rata provision of the abandoned liquidation plan had to be accepted by the Board, either as a matter of contract or Board policy, in its consideration of the new merger plan.

II. IN THE CIRCUMSTANCES OF THIS CASE, THE AGGRIEVED LONG BEACH SHAREHOLDERS, NOT HAVING SOUGHT TO ENJOIN CONSUMMATION OF THE MERGER, ARE NOT ENTITLED TO ANY RELIEF.

A. The Only Conceivable Relief to Which The Aggrieved Long Beach Shareholders Might Be Entitled Is To Set Aside The Merger.

Case and text book authorities describe four possible remedies available to aggrieved shareholders in respect of an allegedly illegal merger: (1) damages for conversion, (2) appraisal rights, (3) enjoining the merger, and (4) setting aside the merger. Antoine on Corporations (rev. ed., 1946), §§ 295 et seq. and as there cited; 15 Fletcher, Corporations (rev. ed., 1961, §§ 7167 and cases there cited; see also 4 Pomeroy, Equity (5th ed. 1941), § 1093.

Relief by way of damages for conversion runs against the predecessor corporation. Lebold v. Inland Steel Co., 125 F. 2d 369 (7th Cir., 1941), mod. 136 F. 2d 876 (1943); American Seating Co. v. Hullard, 290 F. 896 (6th Cir., 1923); Finch v. Warrior Cement Co., 261 F. 2d 44, 141 A. 54 (1928); Wunsch v. Consolidated Laundry Co., 261 F. 2d 44, 198 P. 383 (1921); Garrett v. Reid-Cashion Land &

Cattle Co., 34 Ariz. 245, 270 P. 1044 (1928); Friedman v. South
Co-op. Building & Loan Ass'n., 104 Pa. Super. Ct. 514, 159 A. 8
(1932). The instant complaints cannot be read as asserting cause
of action against Equitable for conversion, and appellees have
requested such relief.

With respect to appraisal rights, this is a statutory remedy
as to which there is no applicable federal statute. Moreover,
while California law as to appraisal rights was made applicable
by the Merger Agreement to certain Long Beach shareholders, such
rights were specifically withheld from those adversely affected
by the distribution provisions. See Section 3 of Article VIII of the
Merger Agreement (Exh. E, p. 48). Moreover, the complaints do
not state a cause of action with respect to appraisal rights and
the appellees do not request such relief.

The merger having been consummated on September 10, 1963,
relief by way of enjoining the merger is now too late. As will
be shown in point "B", infra, this relief was available to but
apparently deliberately, not utilized by the appellees.

Thus, the only conceivable remedy available to aggrieved
shareholders in the circumstances is to set aside the merger, and
the complaints can be read as stating a cause of action for the
granting of such relief. While the appellees have not specifically
requested such relief, such a request can be read into their general

er for appropriate relief.

B. Laches Bars Relief by Way of Setting
Aside the Merger.

Even if appellees should request that the merger be set aside, it is submitted, bars such relief. The doctrine of laches, in the area of mergers, has been stated in the following language (9 Am. Jur. 2d, Corporations, § 1544, p. 900):

"A stockholder who has the right to object to a consolidation, merger, reorganization, or sale of the corporate assets may lose this right by laches, where, with knowledge of the facts, he has delayed the assertion of his rights until the rights of third persons have intervened, or the defendants have expended money or incurred liabilities in reliance on the complainant's apparent acquiescence in what has been done, or it would be inequitable for any reason to grant the relief sought."

The elements of laches are thus (1) full knowledge of the facts, (2) delay, and (3) prejudice to the opposing party or intervening rights of third parties or other inequity. All elements are present here.

All Long Beach shareholders, including the appellee members of the Shareholders' Protective Committee, were on notice of all

The granting of such relief, were it now appropriate, would require Equitable to be divested of Long Beach assets and liabilities. The association would then be in a position to negotiate and execute a new merger agreement for submission to their respective shareholder stockholders and to the federal and state supervisory authorities for the necessary approvals, or to continue their respective business operations if no new agreement were forthcoming.

the material facts with respect to the merger after the mailing of the proxy statement in the middle of June 1963 (Exhs. C-57, C-58). As of that time, the Merger Agreement, containing the allegedly illegal distribution terms, had been executed by Long Beach and Equitable and had been conditionally approved by the Board (Exh. C-56). The Merger Agreement, as executed, was an integral part of the proxy statement, and the proxy statement referred to the possibility that litigation might be commenced in respect of the distribution provisions of the Merger Agreement (Exh. E, p. 5). Thus, the Long Beach shareholders, including the Shareholders' Protective Committee, had an opportunity from the middle of June 1963 until September 10, 1963, to challenge the allegedly illegal distribution provisions by seeking to enjoin the consummation of the merger. Instead the Shareholders' Protective Committee, which purports to represent all Long Beach shareholders^{28/} apparently voluntarily refrained from exercising the aggrieved shareholders' rights to test the validity of the distribution provisions by v

^{28/} The attorney for Long Beach, rather than counsel for the Shareholders' Protective Committee, has played the most active role in the conduct of this litigation.

injunction. They obviously wanted the merger to be consummated rather than enjoined since their two complaints, necessarily prepared in advance, were filed in the federal and state courts the day the merger was consummated. Certainly on these undisputed facts the element of knowledge is present.

As to delay, it has been held that a delay of a month or less is sufficient to give rise to the defense of laches. Andrews v. Precision Apparatus Inc., 217 F. Supp. 679 (S.D. N.Y., 1963); Windhurst v. Central Leather Co., 101 N.J. 543, 138 A. 772 (1927). Where the delay was almost three months, a seemingly unconscionable delay in the circumstances.

With respect to the third element, prejudice has been held to exist and the defense of laches available where a merger has been consummated, assets intermingled, and third parties have obtained rights to the stock of the successor corporation.

National Supply Co. v. Leland Stanford Jr. University, 134 F. 2d 9 (9th Cir., 1943), cert. den. 320 U.S. 773 (1943); Katz v. R. & Co., Inc., 278 App. Div. 766, 104 N.Y.S. 2d 14 (1st Dep't., 1951), 342 U.S. 886 (1951); Windhurst v. Central Leather Co., *supra*; Beling v. American Tobacco Co., 72 N.J. Eq. 32, 65 A. 725 (Ch., 1908); Dana v. American Tobacco Co., 72 N.J. Eq. 44, 65 A. 730 (Ch., 1908), aff'd. 73 N.J. Eq. 736, 69 A. 223 (Ct. Err. & App., 1908), a companion case to Beling; see also Fraser v. Great Western Sugar Co., 185 A. 60 (N.J. Ch., 1935), aff'd. 185 A. 64 (Ct. Err. & App., 1936). In one case it has been held that even if it might be possible to restore the status quo ante, the difficulty and inconvenience

should not devolve upon a defendant corporation due to the delay of a stockholder in bringing suit. Union Financial Corp. of America v. United Investors' Securities Corp., 156 A. 220 (Del. Ch., 1931). In other words, it is not necessary that the process of unscrambling merged corporate entities be an impossible or extremely difficult task. Finally, see Federal United Corp. v. Havender, 11 A. 2d 100 (Del. Sup. Ct., 1940), in which the court stated avoidance of double damages in terms of duty (p. 343):

" . . . where many persons will be affected by an act that involves a change of capital structure and a material alteration of rights attached to stock ownership, the stockholder, having knowledge of the contemplated action, owes a duty both to the corporation and to the stockholders to act with the promptness demanded by the particular circumstances."

In our case the prejudice involved, if the merger were to be set aside, is obvious. By reason of the non-appealable consent order of October 29, 1963, requiring distribution of the Equitable stock not in dispute, the rights of Long Beach shareholders receiving such stock^{29/} would be seriously prejudiced in the event the merger were to be set aside. In addition, purchasers of Equitable stock since the merger would be affected. The assets of Long Beach and Equitable have been intermingled and the unscrambling

^{29/} 465,214 shares of stock have been distributed as of July 2, 1966. See footnote 17, supra.

ereof would pose serious problems, particularly in light of the
that Equitable has been operating as a successor entity for
most three years. The supervisory authorities would also be
ely involved in and burdened by any unscrambling. The Board
ud be concerned about protection of the interests of Long Beach
reholders and the California authorities would be concerned
at protection of Equitable.

Indeed, appellees' position is generally lacking in equity,
that it appears that they have maneuvered both to have their
merger and also to undo the basis upon which it was approved by
supervisory authority, both state and federal. The dilemma with
which they have thus confronted the Court is of their own
liberate construction.

If this Court agrees with appellants' contention that the
remedy now available to the appellees is the setting aside
the merger, the consequence of which would be the divesting
of Long Beach assets and liabilities, and further
res that this remedy is in the circumstances present here
red by laches, such holdings would be dispositive of the
pals, and the District Court should be directed to dismiss
actions and return the impounded stock for distribution in
accordance with the provisions of the Merger Agreement. Only if
the Court disagrees need it consider appellants' additional
arguments.

III. IN ANY EVENT, THE DISTRIBUTION TERMS
OF THE MERGER AGREEMENT ARE VALID

A. The Long Beach Charter Does Not
Require Pro Rata Distribution in
the Case of a Merger

The District Court held (233 F. Supp. at p. 552):

"I am satisfied that and hold that the Officers and Directors of the Association and the Bank Board, or either of them, or the majority of the shareholders did not have the lawful power to alter the pro rata rights of shareholders from that set forth in the law, the charter, and the Settlement Agreement, and that the provisions of the Merger Agreement which attempt to do so are void."

We have shown, supra, pp. 25-29, that the distribution terms of the Merger Agreement are not governed by the provisions of Section 5(i) of the Home Owners' Loan Act of 1933, as amended (U.S.C. 1464(i)),^{30/} or by Article XV of the Settlement Agreement. We shall show here that they are not violative of the Long Beach charter.

The last sentence of Section 9 of the Long Beach charter (19, p. 6) provides:

"All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution or winding up of the association."

^{30/} It is assumed that the District Court's holding that the Merger Agreement violated "law" was in reference to its discussion of the applicability of Section 5(i) of the Home Owners' Loan Act of 1933, as amended, to the instant case.

The question then is whether a merger is a "liquidation, dissolution or winding up" within the meaning of Section 9 of the Long Beach charter. In this connection, Section 3 of the charter empowered Long Beach "to wind up and dissolve, merge, consolidate, or reorganize in the manner provided by law and rules and regulations made thereunder, . . ." The omission of the words "merger" or "merge" from Section 9 was not, as the use of the word "merge" in Section 3 makes manifest, accidental or without significance.

Section 9 was obviously aimed at a situation where a federal association wished to terminate its business through liquidation. In that event the charter required that, after payment of its creditor claims, the association's remaining assets be distributed to its shareholders on a pro rata basis. A merger, on the other hand, does not involve liquidation and distribution of an association's assets. Its assets and liabilities are simply transferred to another association which carries on the disappearing association's business under the resulting association's name and charter.

Whether, in the case of a merger, shareholders of the disappearing federal association receive any consideration other than the assumption by the resulting association of liability for their accounts depends on all the facts and circumstances surrounding the merger. Thus, a merger between a federal association, which is a mutual institution, and another mutual association,

federal or state, would not involve the "distribution of net assets" by the resulting or surviving association.^{31/} Yet the District Court's holding, by reading the word "merger" into Section 9 of the Long Beach charter, would seemingly require a payment in cash or some other "distribution of net assets" by the resulting association to the disappearing federal association's shareholders in connection with their interests in the disappearing association's net worth. Such a requirement could effectively prevent mergers of mutual associations, notwithstanding that the public interest might call for such action.^{32/}

31/ The Supreme Court, in Society for Savings v. Bowers, 349 U.S. 143, 150 (1955), has described a depositor's (saver's) interest in a mutual institution in the following language:

"The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility that hardly rises to the level of an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point."

32/ Any requirement that the net worth of a federal association must be distributed to its shareholders in the event of a merge with another mutual association means in effect that the resulting or surviving association would receive no reserves to absorb losses on the disappearing association's loan portfolio. Since the resulting association's reserves might not be sufficiently large to assume the risk of losses on the assets it would acquire upon merger, the resulting association and/or the supervisory authorities might in such circumstances be forced to turn down the merger.

A merger, on the other hand, as here, of a solvent federal association into a guarantee stock type association (which is owned by its stockholders and not its savings account holders) would necessarily involve a payment by the stock association to the shareholder owners of the disappearing federal association. Such a payment, however, would not be made because of the Section 203 charter provision upon which the District Court relied. The statutory and regulatory provisions referred to under Point IA, supra, pp. 25-29, would require such a payment. The amount and timing of the payment would necessarily depend upon all the facts and circumstances. In this case, the merging parties agreed upon, and the supervisory authorities approved, a payment in the form of guarantee stock of the resulting surviving entity, Equitable. The judicial decisions in the area of corporate law are in accord with our position that a charter provision such as that of Section 9 Long Beach charter provision does not control with respect to a merger. Thus, in Windhurst v. Central Leather Co., 149 A.2d 402 (N.J., 1930); Adams v. United States Distorting Corp., 34 S.E. 2d 244 (Va., 1945); Anderson v. Cleveland-Iron Co., 87 N.E. 2d 384 (Ohio, 1948), it was held that a merger was not a dissolution or a liquidation within the meaning of the applicable corporate charter. In the Anderson case, preferred shareholders sought to prevent the consolidation of two corporations on the ground that the plan of consolidation would deprive them of their charter rights. The charter provided for

payment of certain sums to preferred shareholders in the event of "dissolution, liquidation or winding up of the corporation", and under the proposed plan these payments would not be made. In fact one of the objects of the merger was to escape the arrearage in preferred stock dividends. The Court, after analyzing the basic differences between liquidation and merger, ruled that only when there is a cessation of business and economic functions of the corporation is there any occasion to distribute the assets in the manner described in the charter, and concluded (87 N.E. 2d at p. 396), "In the opinion of the Court the consolidation did not effect 'dissolution' of the defendant corporation within the meaning of that term as used in the liquidation clause of the shareholders' contracts." See also Otis & Company v. S.E.C., 323 U.S. 624 (1945); Langfelder v. Universal Laboratories, Inc., 68 F. Supp. 209 (D. Mass. 1946), aff'd. 163 F. 2d 804 (3rd Cir., 1947); Anderson v. International Minerals & Chemicals Corp., 295 N.Y. 343, 67 N.E. 2d 57 (1946).

B. Assuming Arguendo, That There is a Conflict Between the Distribution Terms of the Merger Agreement and the Long Beach Charter, the Merger Terms, if Fair, Must Prevail.

1. The Board's statutory and regulatory powers are part of the Long Beach charter.

It is an axiomatic principle of corporate law that all statutory and constitutional provisions form part of a charter. Fletcher Corp. (1963 Ed.), § 164. Indeed, the Long Beach charter itself

vides in Section 3 thereof, ". . . the association shall exercise powers in conformity with the Home Owners' Loan Act of 1933 and laws of the United States as they now are, or as they may hereafter be amended . . ." Thus, all Long Beach shareholders were on notice of the Board's statutory and regulatory powers with respect to mergers as set forth in Section 5(d)(2) of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1464(d)(2))^{33/}. They were on notice that Board approval was required with respect to a merger involving a federal association. The controlling regulation^{34/} so provided; under it, the Board had to find the proposed merger plan to be "in the interest of all concerned" before it could grant its approval. As stated above, supra, p. 27, the District Court did not once allude to the controlling statute or regulation.

The statute's text is set forth on p. 20, supra, and has so remained since its amendment by the Act of August 2, 1954, c. 649, Title V, § 503, 68 Stat. 636. Prior thereto the statute read, "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations. . ." Act of June 13, 1933, c. 64 § 5(d), 48 Stat. 133.

The full text of this regulation is set forth on pp. 20-21, supra. A comparable regulation has been in effect since June 1935, prior to the issuance to Long Beach of the charter involved here.

2. As between merger terms and charter provisions the merger terms prevail, if fair.

Another well-established principle of corporate law is that the elimination of a charter right under the terms of a merger does not violate a stockholder's legal or constitutional rights, provided the merger meets the test of fairness.^{35/} Clarke v. Gold Dust Corp., 106 F. 2d 598 (3rd Cir., 1939), cert. den. 309 U.S. 671 (1940); see also Federal United Corp. v. Havender, 11 A. 2d 331 (Dela., 1940); Langfelder v. Universal Laboratories, Inc., 6 F. Supp. 209 (Dela., 1946), aff'd. 163 F. 2d 804 (3rd Cir., 1947); Windhurst v. Central Leather Co., 149 A. 36 (N.J. Ch., 1930), aff'd. 153 A. 402 (N.J., 1931); Adams v. U. S. Distributing Corp., 34 S. 2d 244 (Va., 1945), cert. den. 327 U.S. 788 (1946); Anderson v. Cleveland-Cliffs Iron Co., 87 N.E. 2d 384 (C. P. Cuyahoga County, Ohio, 1948). See also Otis & Co. v. S.E.C., 323 U.S. 624, 631, 638 (1945). As the cases show, the theory underlying this accepted principle is that shareholders have notice of the merger provisions of applicable law, as was true here, and that because of such provisions charter rights may be subject to adjustment.

3. The factual basis in support of the Board's determination that the distribution terms of the Merger Agreement are fair.

Whether the terms of the Merger Agreement attacked by appeal are fair under the circumstances is, of course, a question of fact.

^{35/} Although this issue was extensively briefed by the Board in motion for summary judgment, the District Court neither alluded to the argument nor to the authorities cited in the Board's brief.

judgment. Clarke v. Gold Dust Corp., supra.

This fact question was never reached by the District Court, and on its theory pro rata distribution was legally required regardless of any facts or circumstances pertaining to the large increase in savings accounts at Long Beach on and after April 2,

^{36/}
Despite the exclusion of some evidence^{37/} upon which appellants relied in support of their motion for summary judgment, appellants admit that there is sufficient undisputed documentation to

establish the fairness of the contested merger terms. First, it is pertinent to note that Long Beach management was obligated to refrain from any action which would be detrimental to the interests of its shareholders. Borak v. J. I. Case & Co., 317 F. 2d 838, 842 (9th Cir., 1963), aff'd. 377 U.S. 426 (1964). Appellees have conceded through their proposed findings that Long Beach management played

Under the District Court's theory, had the individuals constituting the management of Long Beach borrowed millions of dollars and deposited in Long Beach in anticipation of either a liquidating dividend in the event there were an Article XV liquidation or a distribution of stock in the event of a merger, or had management with knowledge of the facts stood by and permitted other favored individuals to make such deposits, the depositors would have been fully entitled to receive their pro rata share of Long Beach's assets of worth despite the breach by management of its fiduciary responsibilities to its shareholders.

The records of this Court will disclose that appellants made an attempt to substitute corrected copies for certain lost depositions and certain lost answers to interrogatories, that thereupon this Court remanded the matter to the District Court, that the District Court found that the depositions had not been filed or received in evidence, that the answers to the interrogatories had been filed but not received in evidence, and that this Court then denied appellants' motion.

an important role in the plan to bring large sums of money into Long Beach as follows (3R 1190, 1191, 1215):

"28. In March-April, 1962, Long Beach Federal's officers and its Shareholders' Protective Committee wished to rehabilitate the precarious financial condition 38/ of the seized Association. They felt substantial new savings deposits were urgently and immediately required for such rehabilitation. The first few days of the restored Association upon its return to its founding management were believed to be the most critical time.

"Louis H. Boyar had been a substantial customer of the Association for more than 20 years. He had assisted the Association with deposits in excess of \$100,000 by he and his business associates in 1946-48, upon the Association's return from prior seizures. He was asked to again assist the Association in 1962.

"In 1946-48 the run had been \$10,000,000. In 1960 the run was seven times larger, amounting to about \$69,000,000. Said Boyar was asked by said Association's representatives to obtain many millions of dollars of new deposits in as large amounts as possible. Boyar himself deposited in excess of \$2,000,000. Members of Boyar's immediate family also made large deposits, some of more than \$500,000 each.

38/ This is appellants' footnote, not a footnote copied from the proposed findings. The Wilfand affidavit shows that Long Beach was not in a precarious financial position. As a result of the Settlement Agreement the Insurance Corporation had purchased at book value substantially all of Long Beach's non-earning loans, aggregating about \$23 million. In addition, it had paid Long Beach a \$3 million premium in obtaining payment of the \$45 million debt owing to it by Long Beach. Its liquidity ratio was at the extraordinarily high level of 41% as compared to a regulatory requirement of 7%. (3R 1374-1378). What it needed was not more savings, but more sound loans in which to invest its liquid resources and thereby improve its earnings position.

"After said Association's savings deposits had grown from \$30,000,000 on the day it was restored, April 2, 1962, to in excess of \$60,000,000 before the end of May, 1962. Said Boyar and his family withdrew their personal deposits during June and July, 1962. They do not seek for themselves any share in the distribution of the net assets and surplus of said Association.

"29. Said Boyar contacted many persons of large resources, including those prominent in the entertainment and financial world, and suggested to them that they make substantial deposits in Long Beach Federal upon its return to its founding management. Among the persons so contacted were many who were already familiar with the possibility of a merger combining the Long Beach Federal into Equitable and who were stockholders, investment certificate owners, or others financially interested in Equitable Savings and Loan.

* * * *

"59. Many of the larger depositors are officers, attorneys shareholders or otherwise connected with Equitable Savings and Loan Association. Many of them borrowed the money with which to make their deposits and pledged their Long Beach Federal savings account as security for the amount so borrowed. By so doing they benefited both Long Beach Federal which received their deposits and Equitable which was able to merge with Long Beach Federal when Long Beach Federal became financially strong enough, through such new deposits, so the merger was financially feasible. . . ."

In short, appellees admit that the Long Beach management deliberately had Mr. Boyar, a large Equitable stockholder, contact wealthy friends to have them place large deposits in Long Beach, of such individuals borrowed the funds which they thus invested. were closely identified with Equitable as officers, attorneys stockholders. Some admittedly knew of the planned merger of Beach and Equitable and others were presumably told of this

probability with the consequent gain to them. Indeed, common sense dictates that such large accounts would not have been opened at Long Beach (many with borrowed funds) except for the anticipated gain to result from the anticipated liquidation or merger.

Furthermore, the statistical data in the record (see infra pp. 8 - 11) gives a clear picture of the events which lead the Board to propose the adoption of the contested provisions. Without repeating all that has been heretofore reported, some of the basic figures bear summary. The following table is indicative of the nature of the deposits made on and after April 2, 1962:

<u>Type of Account</u>	<u>No. of accounts as of April 22, 1960 when Long Beach deposits were about \$96 million</u>	<u>No. of accounts opened or increased in period April to Nov. 1962 when Long Beach dissolved merger in contest</u>
Over \$100,000	1	77
\$75,000 to \$100,000	1	6
\$50,000 to \$75,000	0	34
\$20,000 to \$50,000	33	124

The record shows that accounts which increased by \$10,000 or more between April 2, 1962 and November 30, 1962 amounted to \$2.2 million; that \$12.217 million of such amount were pledged to secure loans; and that most of the holders of these accounts had no previous connection with Long Beach (Exh. R). Similarly the data supplied by Long Beach to the California Commissioner (Exh. D referred to in par. XI of Exh. C, attached to Balderston affidavit in support of

Commissioner's motion for summary judgment) shows that accounts which increased by \$20,000 or more between April 22, 1960 and still on deposit on December 31, 1962, amounted to \$17,826,712. Of this aggregate amount only \$167,627 represented accounts in Long Beach on April 22, 1960 when its total savings amounted to approximately \$1 million, clearly demonstrating that most of those affected by the distribution terms of the Merger Agreement had no connection with Long Beach at the time when it was last in normal operation, and had contributed nothing to its net worth.

As the record shows one family interest had on deposit as of December 31, 1962 \$1,167,800, another man and his wife had \$100,000 on deposit, another family interest had \$917,000, two prominent motion picture stars had respectively \$300,000 and \$500,000 on deposit, attorneys for Equitable each had \$250,000 on deposit etc. (Exh. D, referred to in Par. XI of Exh. C, attached to Walderston's affidavit in support of the California Commissioner's motion for summary judgment, pp. 8-14, 18, Exh. S, Exh. C-29A). None of these persons had ever had accounts in Long Beach prior to April 2, 1962. ^{39/}

Exh. C-29A is a tabulation of accounts which increased by \$20,000 or more between April 2, 1962 and November 30, 1962 and was filed to the Board by Long Beach.

Exh. D referred to in Par. XI of Exh. C etc. is a list of deposits in Long Beach, showing an increase of over \$20,000 on various dates between April 22, 1960 and December 31, 1962, furnished by Long Beach to the California Commissioner.

Exh. S is a list of deposits increased by \$10,000 or more between April 2, 1962 and pledged as of November 30, 1962 -- and listing the amounts pledged.

In view of the size of these deposits, completely disproportionate to the normal Long Beach operations, it is reasonable to conclude that these deposits were made in the expectation of sharing in the division of the net worth upon liquidation or merger.

The action of the Board chairman (3R 1002) in insisting upon the provisions herein contested was a bona fide effort to prevent a raid upon the net worth by persons who had not contributed to growth. It should be remembered in this connection that these large and late depositors were entitled to and did receive the normal Long Beach dividends upon their total deposits, no matter when made nor whether pledged. And these dividends ranged from 4.5% to 4.8% (Exh. H).

Appellants submit in conclusion that if the question of fairness is reached, the record supports a finding that the merger provisions relating to distribution of the Equitable guarantee stock were fair.^{40/}

^{40/} If this Court should conclude that the documentation is insufficient and that there is a genuine issue of fact as to the fairness of the distribution terms and as to the breach of fiduciary duty on the part of the Long Beach management, then the actions should be remanded to the District Court for trial. In this event, it is respectfully requested that the Court rule on the propriety of the limitations placed by the District Court on the appellants' right to inquire into the status, on and after September 10, 1963, of the pledged and other accounts adversely affected by the distribution terms of the Merger Agreement (Tr. 368-371, 377-380, 393-395; 3R 598-600, 698-709). The appellant wished to show that most, if not all, of those depositors had closed their accounts promptly or shortly after their rights to share in the Equitable stock distribution had become fixed on September 10, 1963.

4. The Board's determination of fairness must prevail since there was a rational basis to support it.

Under the Congressional delegation of power to the Board and under the applicable Board regulations, it was for the Board to determine whether the Merger Agreement formula for distribution of corporate stock was fair and reasonable. The Board expressly found that such distribution formula was "fair and equitable" (Exh. C-56). Congress having lodged this regulatory power in the Board, the courts cannot substitute their views for those of the Board, if Board action has any rational basis. As the Supreme Court has held, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative agency." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-287 (1934). See also S.E.C. v. Chenery Corp., 332 U.S. 194 (1947); American Power & Light Co. v. S.E.C., 329 U.S. 90 (1946); Gray v. Powell, 314 U.S. 402 (1941); Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939); Cooper v. Woodin, 72 F.2d 179 (D.C. Cir., 1934); Lucking v. Delano, 122 F.2d 21 (D.C. Cir., 1941); Hawkins v. Swan, 52 F.2d 688 (N.D. W. Va., 1931). That the distribution formula insisted upon by the Board and incorporated in the Merger Agreement as executed by Long Beach and that the formula has a rational basis would seem, in light of the foregoing undisputed facts, to be self-evident. In substance the

formula, nullified by the District Court, took as its starting point each shareholder's November 30, 1962 account balance.^{41/} That balance was reduced by (1) then existing share loans or pledges, (2) subsequent withdrawals and (3) the amount by which the remaining balance exceeded the April 22, 1960 balance plus \$10,000. The same formula was applied to "insiders", as defined in Article VII of the Merger Agreement, provided that their participation was limited to an amount not in excess of their April 22, 1960 account balances. Generally speaking, under the Merger Agreement formula all Long Beach shareholders (except "insiders"), whether old or new, could participate in the distribution in an amount measured by account balances not in excess of \$10,000, if their accounts were not pledged as of November 30, 1962. Shareholders as of April 22, 1960, when Long Beach was taken over by the Board and Long Beach accounts amounted to \$96 million, obtained additional participation rights measured by their April 22, 1960 balances, provided any part or all of such balances had remained in or had been reinvested in Long Beach and were not pledged as of November 30, 1962. The \$10,000 figure was selected because that is the maximum amount of federal insurance coverage.

This distribution formula represented an attempt by the Board to restore a reasonable degree of equity to a situation badly

^{41/} After that date persons opening new accounts or adding to existing accounts were required by Long Beach to waive their rights to participate in any distribution with respect to such new accounts or additions to old accounts.

he permitted, indeed solicited influx of accounts into Long
h. Alternatively, of course, the Board might have concluded
the situation was distorted beyond redemption and refused
approval of the merger.

The reasonableness and rationality of the Board's approach
judicially supported. The Ohio courts have recently had
occasion to consider similar problems in connection with the dis-
tributions of two mutual savings banks and the extent to which
various categories of the depositors in such banks could partici-
pate in the distribution of net worth or stock. In In re Cleveland
Savings Society, 25 Ohio Op. 2d 402, 192 N.E. 2d 518 (C.P. Cuyahoga
County, 1961), the court's resolution of the problem was expressed
as follows (at pp. 529-530):

"... this Court has taken into consideration
... the fact that the Members, Trustees,
Directors and Officers had knowledge of the
transaction in December, 1957, and the fact
that these men could be open to undue criticism.
The Court, therefore, finds that the Members,
Trustees and Officers of Society, and the
Directors, stockholders and Officers of National,
and their immediate families (wives and children
living at home) shall not be permitted to
participate in the remaining assets of Society
to the extent of any increases in their accounts,
other than by way of dividends, after December 1,
1957, nor shall they be permitted to participate
in said remaining assets to the extent of any new
accounts opened by any of such persons in Society
after December 1, 1957.

"The proposition of unjust enrichment was also
raised as to third parties. This Court has
examined the record, which includes every deposit
of \$25,000.00 or more made during the year 1958,
and cannot find any pattern or any single instance

which would indicate prior knowledge, or an instance of unjust enrichment.

"Apart from the testimony and the evidence, this Court has also considered the fact that even though these proceedings have been going on for almost three years and have been given wide publicity, no one has come forth with any information or evidence which would indicate that any third person benefited by having had advance information of the transaction. There can be no doubt that the transaction was a well-kept secret.

"It is not likely that either the Superintendent of Banks or the Comptroller of the Currency would have approved or allowed the transaction to be completed if he had felt that the depositors of Society would have been harmed. Both had ample power to stop it. The record is clear that both were fully informed, actively participated to the extent required of them and in fact stated that in their opinion consummation of the Plan would benefit everyone including depositors." (Emphasis supplied)

The principles enunciated in Cleveland Savings Society were later applied in In re Springfield Savings Society, Case No. 609^{42/} Court of Common Pleas of Clark County, Ohio (1965). There the court fixed the participation rights of the mutual bank's depositors to the amount of the lowest credit balance of each depositor, with certain exceptions, during the period commencing October 29, 1964 and ending February 9, 1965. On the latter date the deposit liabilities of the mutual bank were assumed by the newly created

42/ A copy of the Court's opinion is reproduced in the Appendix 13a-52a. The Ohio Court of Appeals of Clark County, Ohio on June 1966, reversed and remanded the case to the Court of Common Pleas but solely on the issue of the rights of the City of Springfield to participate in the distribution. This decision is reproduced in Appendix, pp. 1a-12a.

ingfield Bank", the surviving stock institution. October 29, 1963 was the date a general notice was sent to all depositors with respect to the combining of the institutions involved. The Court excluded from participation in the distribution all deposits made prior to June 18, 1963 by persons with certain inside knowledge and information of the dissolution plan. June 18, 1963 was the date discussions first began relative to the change of the mutual savings institution into a stock company. The basis for the ban on distribution with respect to those deposits was the receipt by the mutual bank of between fifty and sixty deposits from persons out of Ohio who had no previous association with the institution. In that connection the Court observed that on June 18, 1963 a securities broker and financial analyst, who specialized in mutual savings societies and who knew of the Cleveland Savings Society, came to Springfield to discuss with the Society's management the possibility of terminating the Society's activities as a mutual institution. Thereafter this same broker helped to negotiate the purchase and transfer of the Society's assets for which he was compensated by the purchaser. The Court's discussion follows (pp. 37a-44a):

" . . . between June 18, 1963 and December 5, 1963, and before the negotiations between buyer and seller for the purchase of petitioner's assets were formally undertaken, the same broker, without the knowledge or consent of petitioner, had notified by letter and otherwise a large number of persons, including his partners, his clients and prospective clients and their friends, of the likelihood of the conversion of petitioner

from a mutual savings bank, and recommended to these people that they make deposits of any of their 'idle funds' so that they might participate in the cash surplus should a sale be consummated, even though the current rate of interest would be lower than they could receive elsewhere. He also conveyed this information to a number of security brokers in Philadelphia and New York. . .

"The record further discloses that petitioner took notice of these unusual deposits and called the same to the attention of the broker, and at the instance and urging of petitioner, and beginning in November 1964, the broker contacted each of these depositors and made an effort to persuade them to withdraw their accounts, advising them that he had doubt as to the legality of their deposits, and advising them further that they would not be allowed in any event to participate in the distribution of the cash surplus. Most of these depositors followed his advice and withdrew their deposits, but fourteen of them failed and refused to do so.

"On May 19, 1965 a hearing was held for the specific purpose of considering the right of these depositors to participate in the plan. . . . At that hearing the broker . . . (testified) . . . that these deposits were made in reliance on an anticipated windfall. He could offer no other explanation or reason as to why any of these persons or organizations from out of the state would make their deposits in a Springfield bank. . .

"Petitioner contends that by reason of these facts, . . . they should be excluded from participation in the distribution of its assets.

"It should be emphasized that the information upon which these depositors acted was not culled from financial statements or based on documents or announcements relating to the financial condition of petitioner and available to all potential investors alike. It came to them in the manner above described and there is no credible evidence in the record to the contrary.

"The Court is aware that, by the ordinary standards which apply to the 'market place', what happened

above may be considered normal and proper, and the Court sees no need to make further comment on the ethical considerations that may be involved. However, it must be remembered that we are not dealing here with the practices of the 'market place'. Banks are in a different and special category. They provide the life blood for our economy. The stability of the whole community may be undermined by any suspicion of manipulation or speculation in any of its affairs.

"It should be noted that the trustees of the Springfield Savings Society, undoubtedly mindful of the sensitive nature of their position and anxious to avoid any suspicion of unjust enrichment accruing to themselves by reason of their access to confidential information, voluntarily renounced for themselves, their wives, and any of their children who lived with them after June 18, 1963, the right to participate in the surplus fund.

"These fourteen depositors differ from the trustees only in that they themselves were not officers of petitioner or related to them, but they are otherwise alike in that they became privy to the same confidential information accessible to the others on June 18, 1963, and thereafter, and before the same became a matter of public knowledge.

"Incidentally, the Cleveland case recognized the validity and logic of this reasoning and disqualified from participation those persons who became depositors after the negotiations for the sale of the Cleveland Savings Society began or increased their deposits after that date, on the ground that, having had information as of that date, they were barred. As previously noted, the record in the Cleveland case discloses that only members and trustees of the two banks in Cleveland fell in that category, and thus there was no need in that case to consider the effect of this knowledge on any other persons.

"This Court is of the opinion that the same reasons which led to the disqualification of the trustees and members of the Cleveland banks, and which by the voluntary action of the trustees of petitioner bars them and their families from participating, applies with equal weight to the fourteen depositors under consideration.

* * * * *

"The relationship between a mutual savings bank and its depositors is not merely one of debtor and creditor, but one of agent and principal as well. The relationship was defined as long ago as 1896 by the then Circuit Court for this very district in a case, oddly enough, involving the same petitioner but concerned with issues unrelated to those in the instant case. The Court refers to Collett, Treas. v. Springfield Savings Society, 13 O.C.C.R. 131. The Court in that case discussed the reasons for the existence of mutual savings societies and concluded that, while the relation of bank and general depositor is simply the ordinary one of debtor and creditor, 'the relation of savings society, such as defendant, and depositor is that of agent and principal.' It is elementary that an agent is regarded as a fiduciary, and the relationship between agent and principal is one that implies trust and confidence and unqualified exercise of loyalty, fidelity and good faith in the execution of its responsibilities. (See 2 O.J. (2d) 168, etc.)

* * * * *

"The Court wishes also to state that no criticism or slur is intended for any of the fourteen depositors, who, as far as the record discloses, acted in good faith and seized an opportunity to make what was represented to them to be a highly lucrative investment. They are not being penalized by any decision reached by this Court. Their accounts are secure, and they, together with all other depositors, are entitled to receive and keep the interest accumulated to their accounts.

"However, the Court does find that each of the fourteen depositors did have knowledge or information that the officers or trustees of the petitioner had discussed with individuals not associated with the Society the possibility of terminating its activities as a mutual savings bank and knew that the officers of an investing corporation had expressed an interest in exploring the acquisition of the Society, and that their deposits were made as a result of such information and for the sole purpose of speculating upon the possibility of participating in this surplus and were not made within the usual and normal course of business."

The facts present here are quite analogous to and indeed
greater than those in the Springfield Savings Society case. Here,
in contrast to Springfield, the Long Beach management actively
participated in the solicitation of savings accounts at Long Beach,
accounts opened for the purpose of obtaining a windfall. The
principles applied by the Board in insisting upon the distribution
of the Merger Agreement are consonant with those applied by
Ohio courts and with the Board's statutory and regulatory re-
sponsibilities. Clearly on the basis of the Ohio precedents alone,
Board action in insisting upon the restrictive distribution
should have been upheld as fair and equitable.

IV. THE CALIFORNIA COMMISSIONER IS AN IN-
DISPENSABLE PARTY TO THE ACTIONS; SINCE
HE WAS NOT SUBJECT TO SUIT IN THE
DISTRICT COURT, THE ACTIONS MUST BE
DISMISSED.

The District Court concluded that the appellant California
Commissioner was subject to its jurisdiction and accordingly found
unnecessary to pass on the question of whether he was an indis-
pensable party to the actions, since he was at least a proper party
F. Supp. at p. 590).^{43/}

The California Commissioner under state law, supra, pp. 21-22,
required to approve the Merger Agreement in order for it to be
effective and he was also required to approve the issuance of

The California Commissioner was not and was never made a party
Civil Action No. 63-1072 PH, the action commenced in the District
Court on September 10, 1963.

the Equitable guarantee stock which is the subject matter of the litigation. The Commissioner did approve the Merger Agreement (Exh. D-7), including the disputed Article VII, and did authorize the issuance of Equitable stock conditioned on the stock being distributed in accordance with the terms of Article VII (Exh. D-8). A challenge to the merger agreement is a challenge to the administrative action of the California Commissioner and in these circumstances he is an indispensable party. MacArthur Liquors, Inc. v. Palisades Citizens Association, Inc., 265 F. 2d 372 (D.C. Cir., 1959); Blackmar v. Guerre, 342 U.S. 512 (1952); Hicks v. Summer, 261 F. 2d 752 (D.C. Cir., 1958), cert. den. 359 U.S. 959 (1959) and the cases there cited. As was stated in the MacArthur Liquors supra, at p. 374:

"The members of the Board are indispensable parties to a suit which seeks to set aside the Board's action."

The test for an indispensable party was set forth by this Court in State of Washington v. United States, 87 F. 2d 421, 427-428 as follows:

"(1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

This test has been cited with approval in Moore's Federal Practice Vol. 3, p. 2155, and again recently by this Court in McShan v.

erill, 283 F. 2d 462 (1960). See also Shields v. Barrow, 17
rd (58 U.S.) 130 (1854). Applying this test, it is obvious
the interest of the Savings and Loan Commissioner is not
rable from that of the other parties to the lawsuit nor can a
ee be entered without affecting his interest. Thus, under the
set forth by this Court, the California Commissioner clearly
n indispensable party.

Since, as the California Commissioner has demonstrated,^{44/} the
District Court had no jurisdiction over him, and since, as we have
on, he was an indispensable party in this litigation, the three
ons should have been dismissed.

CONCLUSION

The judgments of the District Court should be reversed and the
ons remanded to the District Court for the entry of orders dis-
ing the actions with prejudice on the following grounds.^{45/}

So as not to burden the Court with unnecessary repetition, the
llants Board and Insurance Corporation adopt the arguments set
h in the brief of the California Commissioner on the issue of
District Court's jurisdiction over him.

If this Court should agree with the legal theories of the District
t in all respects, it is respectfully requested that the judgments
he District Court be modified with respect to the 71,183 shares of
table stock which it ordered reserved for use in the payment of
s and attorney fees, if any, when allowed (3R 1648). While the
rict Court's judgments did not clearly set forth the source from
h the 71,183 shares were derived, the appellees' proposed judgment
lies this information (3R 1528-1533). Of the 71,183 shares, 59,100
esent the number of shares attributable to former Long Beach share
ers who would have been eligible to receive the shares had they
tained their accounts in Long Beach until September 10, 1963. In
tion, 6,154 shares represent the number which would have been dis-
utable with respect to the share accounts opened at Long Beach

(Continued on page 68)

1. The District Court had no power to change the distribution terms of the Merger Agreement and to order distribution of the Equitable stock on a pro rata basis and, in the circumstances, the aggrieved Long Beach shareholders, not having sought to enjoin the merger, are not entitled to any relief.

45/ (Continuation)

after April 2, 1962 in the amount of \$560,000 in connection with a transaction involving the payment of past due attorney fees to counsel for Long Beach and with respect to which accounts the attorney's alleged participation rights were waived. The remaining 5,923 shares resulted from alleged errors in computing the amount distributable under the consent order of October 29, 1963. Appellees characterized the 71,183 shares as abandoned (3R 1529). Apparently the District Court agreed because of the terms of its judgments. As noted therein (3R 1706), 58,179 of such shares represented part of the 585,821 shares of stock which should have been distributed under the consent order of October 29, 1963 to Long Beach shareholders who had nothing to gain from the litigation and conceding which there was no dispute. The remaining 13,004 shares of the 71,183 reserved for costs and counsel fees constitute part of the 205,829 shares which are in dispute and which are distributable under the District Court's judgments to shareholders who are subject to the restrictive provisions of the Merger Agreement.

The District Court order allowing attorney fees demonstrates disposition made of the 71,183 shares (App., p. 80a). The court permitted them to be used in the payment of attorney fees to counsel for Long Beach and the Shareholders' Protective Committee. No other shares were reserved for that purpose. As a result, those Long Beach shareholders who had nothing to gain from the litigation instituted and prosecuted by the Shareholders' Protective Committee and by Long Beach and to whom 58,179 of the 585,821 undisputed shares should have been distributed under the consent order of October 29, 1963, are required to pay for a portion of the allowed attorney fees. Those shareholders were represented by the Board and not by the Shareholders' Protective Committee (footnote 2, p. 4). The shareholders who stand to benefit from the District Court's judgments and who were represented by the Shareholders' Protective Committee are required to utilize only 13,004 shares of the 205,829 disputed shares, which are distributable to them under such judgments, towards payment of attorney fees. The inequity and unreasonableness of this result is self-evident.

The District Court judgments should be modified so that the former Long Beach shareholders who gained nothing from this litigation, but whose participations rights were lessened by 205,829

(Continued on page 69)

2. In any event, neither the law, the Long Beach Charter, the Settlement Agreement required a pro rata distribution and, in light of the undisputed material facts, the distribution terms are fair and equitable and therefore valid.

3. The California Commissioner was an indispensable party to the actions and, since he was not subject to suit in the District Court, the actions must be dismissed.

In the event the Court should conclude that a pro rata distribution of Equitable stock was legally required, regardless of the facts and circumstances present here, and that laches does not bar relief in the circumstances, the cases should be remanded to the District Court with instructions to set aside the merger, and to take appropriate action, in light of all now existing facts and circumstances, to divest Equitable of Long Beach assets and

(Continuation)

Shares of Equitable stock, should not bear any part of the legal fees which may be finally awarded in these actions; the 58,179 shares, which were reserved by the District Court for payment of attorney fees and which constitute part of the 585,825 shares distributable to such Long Beach shareholders under the October 29, 1933 consent order, should be ordered distributed to them. If any Equitable stock is to be reserved for the payment of legal fees, it should be out of the 205,829 shares of stock distributable to those Long Beach shareholders, represented by the Shareholders' Protective Committee, who were subject to the restrictive provisions of the Merger Agreement, and who benefit by the District Court's judgments. The only fund created or preserved through this class action litigation is the disputed 205,829 shares. It is only this fund which should be employed for payment of counsel fees. Abbott, Puller & Myers v. Peyser, 124 F. 2d 524 (D.C. Cir., 1941); United States v. Key, 98 F. Supp. 431 (D. Montana, 1951).

liabilities so that a new merger agreement, without the illegal provisions, may, if Long Beach and Equitable should so desire, be entered into and submitted for the necessary approvals or disapprovals by the respective members and stockholders of Long Beach and Equitable and by the federal and state supervisory authorities.

J. WILLIAM DOOLITTLE,
Acting Assistant Attorney General

MANUEL L. REAL,
United States Attorney,

CARL EARDLEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel

KENNETH E. SCOTT,
General Counsel,
Federal Home Loan Bank Board,

MAX WILFAND,
Assistant General Counsel,
Federal Home Loan Bank Board.

OCTOBER 1966

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL EARDLEY
Attorney, Department of Justice
Washington, D. C., 20530.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants

v.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPENDIX TO BRIEF FOR APPELLANTS FEDERAL HOME LOAN
BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION

JOHN W. DOUGLAS,
Assistant Attorney General,

MANUEL L. REAL,
United States Attorney,

CARL EARDLEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

unsel WM B LUCK, CLERK
TH E. SCOTT,
eral Counsel,
eral Home Loan Bank Board,

ILFAND,
istant General Counsel,
eral Home Loan Bank Board.

FEB 10 1967

FILED

SEP - 1 1966

INDEX TO APPENDIX

	Page
Decision of Court of Appeals of Clark County, Ohio In the Matter of The Dissolution of the Springfield Savings Society of Clark County, Ohio -----	1a
Decision of Court of Common Pleas of Clark County, Ohio In the Matter of The Dissolution of the Springfield Savings Society of Clark County, Ohio -----	13a
Opinion of District Court (S.D. Calif.) re attorneys' fees -----	53a

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

IN THE MATTER OF THE DISSOLUTION :
OF THE SPRINGFIELD SAVINGS SOCIETY : CASE NO. 629
OF CLARK COUNTY, OHIO :

.....

O P I N I O N

Rendered on the 23rd day of June, 1966

.....

UNBAR, KIENZLE & MURPHEY
50 West Gay Street, Columbus 15, Ohio
OLE, COLE and HARMON
914 First National Bank Bldg., Springfield, Ohio
Counsel for Petitioner

HARLES E. CARTER
City Building, Springfield, Ohio
Counsel for The City of Springfield, Ohio

.....

HERER, P. J.

This matter is pending in this Court on an appeal on questions of law from an order of the Common Pleas Court of Clark County in an action involving the dissolution of The Springfield Savings Society determining that Appellant, the City of Springfield, was not entitled to participate in the distribution of its surplus assets.

The cause is before the Court on Motion of Appellee to dismiss the appeal for the reason that Appellant has not filed its brief and assignments of error within the time provided by Rule VII of this Court or shown good cause for such failure, and for the reason that a Bill of Exceptions is required to portray the claimed error and none has been filed. Appellee has moved also to strike

Appellant's brief. Appellant filed a brief while this matter was pending on an appeal on questions of law and fact but has filed no additional brief since such appeal was reduced to an appeal on questions of law. Such brief will be considered by the Court as a brief and assignments of error on the law appeal on the merits. Appellee's Motions to strike this brief and to dismiss the appeal for failure to file brief and assignments of error will be overruled. The record discloses that no Bill of Exceptions has been filed herein and the Court will proceed to consider the appeal in the light of the record before us in the absence of a Bill of Exceptions.

The Trustees of Appellee Savings Society elected to dissolve the Society voluntarily as provided in Section 1702.47 (C)(3) of the Revised Code. Neither the law nor the Regulations of the Society provides a method for, or designates the persons who shall be entitled to receive a distribution of Surplus assets upon dissolution of the Society. Under such circumstances, Section 1702.47 (D)(3) of the Revised Code authorizes the Trustees to determine and adopt a plan for the distribution of such assets. Item (1) of the Plan submitted to the Court enumerates the classes of accounts, the owners of which are to be considered "Depositors". Among these are holders of certificates of deposit during the period from 10/29/60 to 2/9/65 and governmental authorities for whose account the Society held monies pursuant to the Uniform Depository Act of the State of Ohio continuously during said period.

Item (4) of the Plan adopted by the Trustees provides that such surplus shall be distributed as follows:

"(a) To and among such Depositors as the Court shall determine be the beneficial owners of such Surplus.

"(b) As between such Depositors, such Surplus is beneficially owned by each in the proportion which his Deposit Balance bears to the aggregate of the Deposit Balance of all Depositors * *.

"(c) Each Depositor who is determined by the Court to be a beneficial owner of the Surplus shall be entitled to receive, subject to all the terms and provisions of the Plan, at the dates of distribution determined in the manner hereinafter provided, cash in an amount equal to his proportionate share of Surplus as determined in the Plan set forth above."

It is conceded in argument that Appellant, the City of Springfield, is a "Depositor" as defined in the Plan.

Supervisory power over the dissolution of the Society is conferred upon the Common Pleas Court by Section 1702.49 (G) of the Revised Code, to be exercised as provided by Section 1702.50 of the Revised Code. The latter section empowers the Common Pleas Court to adjudicate the question at issue here.

The question to be determined is whether the Common Pleas Court was correct in determining that Appellant, the City of Springfield, was not the beneficial owner of a share in such Surplus.

The Common Pleas Court approved the Plan of Distribution of the assets of the Society adopted by the Trustees with certain exceptions

spelled out in the judgment entry and determined that the only type of Depositors entitled to share in the surplus fund of the Society are regular savings pass book Depositors, School Savings Depositors and holders of Certificates of Deposit other than Certificates of Deposit issued to a governmental subdivision under the Uniform Depository Act of the State of Ohio. The Court's opinion states that its decision is based upon the reasoning of the Court in *In re Dissolution of the Cleveland Savings Society*, 91 Ohio Law Abs. 20, 192 N.E. (2d) 518.

In that case, the Plan adopted by the Trustees for the distribution of the Surplus defined "Depositors" as any person holding or entitled to hold, a savings pass book issued by the Society pursuant to the rules and regulations relating to savings accounts promulgated by it and provided that: "(3) Subject to the approval of the court in the Special Action hereinafter provided: (a) The Depositors, as of the close of business December 31, 1958, and not other persons, are the beneficial owners of, and are entitled to receive distribution of the Surplus of Society."

Involved in that action were the rights of depositors, former depositors, including corporate depositors, political subdivisions as owners of public deposits, persons owning or interested in Christmas Club accounts, escrow accounts, Employees' United States Savings Bond Depositors, funds held by borrowers, borrowers' construction loan funds, hypothecated deposits on installment loans outstanding certified checks and outstanding checks, official checks

er depositors or creditors of the Society, and other persons might have rights upon the assets of the Society.

At Pages 321, 322, the Court said that:

"It appears to this Court that for any persons, or classes of persons, to be entitled to share in the distribution of the remaining assets of Society, it would be incumbent on them to show in a recent dissolution of this kind that not only a debtor-creditor relationship had been created, but also that an intangible ownership interest in the surplus had been created. Only those persons who indicated an intention to become regular savings depositors, who received savings passbooks as evidence of their property interest in Society, who were entitled to receive dividends rather than interest, nothing, whose right to withdraw their funds was determined in accordance with the regulations and Rules Relating to Deposits (See Section Exr. 1-D), had intangible ownership interests in Society.

"Persons owning or interested in Christmas Club accounts,orrow accounts, Employees' United States Savings Bond deposits, funds held for borrowers, borrowers' construction loan funds, mortgaged deposits on installment loans, outstanding certified checks, outstanding checks, and official checks did not meet the requirements necessary to create an intangible ownership interest. Contracts with such persons were special contracts which distinguished them from regular savings depositors. They had no savings passbooks in Society, received no dividends from Society, and their right, if any, to demand payment of such funds was determinable in

accordance with their special contracts or general law and not governed in any way by the regulations and Rules Relating to Deposits. Therefore, this Court finds that these persons, or classes of persons, shall not be entitled to share in the distribution of the remaining assets of Petitioner.

"Public funds were held by Society for the account of certain municipal corporations pursuant to special written contracts which were governed by the provisions of the Uniform Depository Act of the State of Ohio. These contracts provided for the payment of a fixed rate of interest, the repayment of all money held, and were fully secured by obligations of the United States of America. In light of the distinctive nature of these deposits, as contrasted to the regular savings deposits in Society, this Court finds that this class of depositors shall not be entitled to share in the distribution of the remaining assets of Petitioner."

In *Society for Savings in the City of Cleveland v. Peck*, 161 Ohio St. 122, 118 N.E. (2d) 651, the court held that the depositors owned the capital, surplus, reserve fund and undivided profits of a Savings Society. The court noted that the same principle had been expressed by courts of other states in *Bank Commissioners v. Watertown Savings Bank*, 81 Conn., 261, 70 A., 1038; *Barrett v. Bloomfield Savings Institution*, 64 N.J. Eq. 425, 54 A. 543; *Huntington v. Savings Bank*, 96 U.S. 388, 24 L. Ed. 777; *Lewis, Admr., v. Lynn Institution for Savings*, 148 Mass., 219 N.E., 365; *Cogswall v. Rockingham Ten Cents Savings Bank*, 59

3 Worcester County Inst. for Savings v. City of Worcester, 10
ching (Mass.), 128, and Providence Inst. for Savings v. Gardner
I., 484.

We must begin our consideration of the question at issue here,
n, with the general proposition that ordinarily the Depositors
f the Springfield Savings Society, including all holders of
etificates of deposit, own the beneficial interest in the Surplus.
n the case here, unlike in *In Re Dissolution of Cleveland Savings*
ociety, *supra*, the Plan of Distribution adopted by the Trustees
ained governmental authorities as Depositors. Also, in that case,
Trustees specified the type of Depositors entitled to share in
n distribution of the Surplus. Here, the Plan adopted by the
rstees empowered the Court to determine what Depositors were the
eficial owners of the Surplus. In the Cleveland case, the plan
dpted by the Trustees eliminated every depositor from partici-
aion in the Surplus excepting the holders of savings pass books who
eived dividends rather than interest and whose right to withdraw
air funds was determined in accordance with the regulations and
ues Relating to Deposits. Here, the court determined that holders
fcertificates of deposit, other than governmental agencies, were
eficial owners of the Surplus. The City of Springfield was
ied the right to participate in the distribution of the Surplus
ely because the Society was required by Section 135.16 of the
ised Code to pledge security for the City's deposit.

The claim filed by the City of Springfield is predicated upon claimed deposits in the nature of a checking account, Time Certificate of Deposit (Savings Society), Active Deposits (commercial bank), Project Expenditure Account (commercial bank), and Project Expenditure Account (Savings Society). In the absence of a bill of exchange or a finding by the court of Appellant's ownership of such accounts, we know nothing about the nature of such accounts or if they exist excepting that the Petition herein states that Appellant has Deposits in the Society pursuant to the Uniform Depository Act and the judgment entry states that holders of Certificates of Deposit, other than governmental subdivisions, shall share in the distribution of the Surplus. We can assume, therefore, only that the City owns Certificates of Deposit in some amount pursuant to the provisions of the Uniform Depository Act of the State of Ohio.

In the opinion of Bank Commissioners v. Watertown Savings Bank, supra, it is said that:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or profits of savings-banks belong to the depositors and a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this

...e, that depositors, or their representatives, are entitled to
the pecuniary benefits arising from the deposits, less the
reasonable expenses that may be chargeable thereon." (Emphasis
this Court.)

In *Barrett v. Bloomfield Savings Institution*, supra, it is
stated on Page 434 in the opinion in quoting with approval from the
opinion in *Hannon v. Williams*, 7 Stew Eq., 255:

"In a savings bank the depositors bear, in great degree, the
relation to each other and to the property of the bank as do
stockholders in other monetary institutions. To the corporation
itself they occupy the double relation of stockholders and creditors.
In prosperity they are the stockholders among whom the profits are
divided. In case of insolvency they are the creditors, and usually
the only creditors, among whom the remaining assets are to be dis-
tributed."

The Surplus here is the fruit of the deposits. It is a part
of the deposits and belongs to the Depositors just as an apple is a
part of and belongs to the tree which brought it into being.

In *Lewis, Admr. v. Lynn Institution for Savings*, supra, it is
stated at page 243 of the opinion that:

"* * * the fundamental idea has never been departed from, that
the funds and investments of a savings bank are held exclusively
for the benefit and security of the depositors * * *."

We cannot conclude, as did the court below, that the Uniform
Depository Act should operate to deprive governmental subdivisions

of any benefit accruing to their deposits of public funds. A portion of the funds of the City of Springfield were withheld by the Society to create the Surplus for the benefit and security of all of the Depositors of the Society. Since the Surplus was created for the benefit and security of the Depositors, we see no reason to deprive the City of the benefits of the Surplus because the State has required the pledge of securities for the added security of the City's deposits. This added protection afforded the public by the Uniform Depository Act in no way alters the status of the City's deposit. In *Eastman v. Ohio Mutual Savings and Loan Company*, 20 Ohio Law Abs., 506, it was said that the fact that a deposit is secured by pledge of securities does not change the character of a deposit. The fact that security is given for a governmental subdivision's deposit is a fact to be considered only when the assets of the Society are insufficient to repay the deposits. The Common Pleas Court did not follow the holding in the Cleveland case that only owners of deposits evidenced by passbooks are entitled to share in the Surplus. The Court here allowed the holders of Certificates of Deposit other than governmental subdivisions to share in the Surplus.

There may be some facts relative to the City's Certificate of Deposit which would distinguish them from other Certificates of Deposit and would support a conclusion that the City's Certificate did not entitle it to participate in the Surplus. Section 135.01 of the Revised Code provides that the appropriate board shall award

deposit to the financial institution offering to pay the highest rate of interest which can legally be paid. It may be that the City enjoyed a rate of return on its Certificates of Deposit in excess of the rate of return paid by the Society to other holders of Certificates of Deposit and of passbooks and of other deposits permitted to participate in the Surplus as to warrant a finding that the City has enjoyed such special benefits beyond its contribution to the Society's Surplus that it should not share therein because it is in a different class than other Depositors. But, the Court did not base its judgment on such distinction. The judgment, as shown by the Court's opinion, was based solely upon the fact that the City's Deposit was secured by pledge of securities. In *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 131 O. (2d) 390, the Court held that:

"3. It is an invariable rule that the court speaks only through its journal, and where its opinion and its journal are in conflict the latter controls and the former must be disregarded.

"4. However, where it is essential in the interest of justice to a reviewing court to ascertain the grounds upon which a judgment of a lower court is founded, and the judgment entry fails to disclose such grounds, resort may be had to the opinion of the lower court to ascertain those grounds."

At 281, the Court said that resort could be had to the opinion of the lower court to ascertain the grounds upon which a judgment is rendered where there is no conflict between the opinion and the

judgment entry. There is no such conflict here and we have deemed it essential in the interests of justice to examine the opinion of the Common Pleas Court to ascertain the grounds upon which its judgment was founded.

We conclude that the Common Pleas Court erred in denying the City of Springfield a right to share in the Surplus arising out of its ownership of Certificates of Deposit because such deposit was secured as required by the Uniform Depository Act of the State of Ohio.

The judgment of the Common Pleas Court will, therefore, be reversed and the cause will be remanded to that Court for further proceedings according to law.

.....

CRAWFORD and KERNS, JJ., concur.

IN THE COURT OF COMMON PLEAS OF CLARK COUNTY, OHIO

In the matter of:

THE DISSOLUTION OF THE

SPRINGFIELD SAVINGS SOCIETY

OF CLARK COUNTY, OHIO

)
)
)
)
)
)

CASE NO. 60513

D E C I S I O N

GOLDMAN, J.

This matter is before the Court on a petition for judicial supervision of proceedings in dissolution filed by the Springfield Savings Society of Clark County, Ohio, hereinafter referred to as "the petitioner."

The action was instituted pursuant to section 1702.50 of the Revised Code of Ohio, a part of the chapter on nonprofit corporations, and deals specifically with the jurisdiction of the Court in winding up the affairs of a voluntarily dissolved corporation.

Petitioner is a corporation organized in 1873 as a mutual savings society without capital stock.

On December 31, 1933, it was reincorporated due to a change in the law, and from those dates until February 9, 1965, it carried on its business as a mutual savings society pursuant to chapter 1109 R.C.

judgment entry. There is no such conflict here and we have deemed it essential in the interests of justice to examine the opinion of the Common Pleas Court to ascertain the grounds upon which its judgment was founded.

We conclude that the Common Pleas Court erred in denying the City of Springfield a right to share in the Surplus arising out of its ownership of Certificates of Deposit because such deposit was secured as required by the Uniform Depository Act of the State of Ohio.

The judgment of the Common Pleas Court will, therefore, be reversed and the cause will be remanded to that Court for further proceedings according to law.

.....

CRAWFORD and KERNS, JJ., concur.

IN THE COURT OF COMMON PLEAS OF CLARK COUNTY, OHIO

In the matter of:

THE DISSOLUTION OF THE

SPRINGFIELD SAVINGS SOCIETY

OF CLARK COUNTY, OHIO

)
)
)
)
)
)

CASE NO. 60513

D E C I S I O N

GOLDMAN, J.

This matter is before the Court on a petition for judicial supervision of proceedings in dissolution filed by the Springfield Savings Society of Clark County, Ohio, hereinafter referred to as "the petitioner,"

The action was instituted pursuant to section 1702.50 of the Revised Code of Ohio, a part of the chapter on nonprofit corporations, and deals specifically with the jurisdiction of the Court in winding up the affairs of a voluntarily dissolved corporation.

Petitioner is a corporation organized in 1873 as a mutual savings society without capital stock.

On December 31, 1933, it was reincorporated due to a change in the law, and from those dates until February 9, 1965, it carried on its business as a mutual savings society pursuant to chapter 1109 R.C.

The First State Bank in the village of South Charleston, Ohio, was acquired by petitioner on or about June 10, 1950. The Savings Society Commercial Bank, with offices in Springfield, Ohio, was organized by petitioner on April 20, 1956. Each of these two banks were thereafter operated as subsidiary corporations of petitioner as commercial, savings, and special plan banks.

On February 6, 1965, the above two institutions were merged and their name changed to "The Springfield Bank," and thereafter all of the facilities and operations of the newly merged and named institution and those of petitioner were combined under the name "The Springfield Bank."

On February 8, 1965, all of the outstanding shares of the newly created Springfield Bank were sold to the Ohio Center Corporation, an Ohio corporation.

On February 9, 1965, petitioner sold and transferred to the Springfield Bank all of its operating assets, and received from the Ohio Center Corporation and the Springfield Bank, in payment for all of its assets, the sum of \$2,504,333.31 in cash. On that date also the Springfield Bank assumed petitioner's deposits and liabilities.

All of the issues dealt with in this opinion relate to the proper distribution of this sum of money,

in some instances referred to in the record as "net assets" of petitioner, and in other instances as "surplus fund." It might be pointed out that section 1109.10 R.C. defines "surplus fund" as the "net assets" of a society for savings or of a savings society over and above the amount of its debts and deposits, etc. Thus, when either term is used, we are referring to the \$2,504,333.31 which petitioner has on its hands for distribution.

The transactions involving the merger and the sale of assets were undertaken pursuant to an agreement entered into on June 17, 1964, by and between the trustees of petitioner and the Ohio Center Corporation, and the sale and acts of the trustees taken in connection with the execution and performance of the agreement were approved by resolution adopted at a special meeting of the members and other depositors of petitioner on December 8, 1964.

All of the above transactions were approved by the Superintendent of Banks of the State of Ohio and the Federal Deposit Insurance Corporation, and were undertaken and completed according to law.

None of the transactions or proceedings above described were questioned or challenged, and the legality or validity of these proceedings are not an issue in this action.

On February 10, 1965, following sale of its assets as described, and as authorized by section 1702.47 (C) (3), the trustees of petitioner adopted a resolution to dissolve its corporate existence as a mutual savings society, and on February 16, 1965, a certificate of dissolution was filed in the office of the Secretary of State.

Also on February 10, 1965, and pursuant to section 1702.49 (D) (3), the trustees of the petitioner adopted a plan to distribute the cash it received as the sales price for its operating, investment, and other assets. This plan proposed that the surplus fund be distributed to and among such type or types of former depositors of the petitioner as the Court shall determine to be the beneficial owners as set forth in the plan, and further that each depositor found entitled to share in the surplus assets shall be entitled to share in the proportion that his deposit balance bears to the aggregate of the deposit balances of all eligible depositors. (All underlining in this opinion is by the Court.)

The term "deposit balance" is defined in the plan as:

- (a) the amount of the lowest credit balance in the account or to the credit of an eligible depositor during the period commencing with

the opening of business on October 29, 1964, and ending with the assumption of the petitioner's time and demand deposit liability by the Springfield Bank (which was on February 9, 1965); or

- (b) the face amount of a time certificate of deposit owned by an eligible depositor continuously during the above described period;

excluding, however, any amount deposited or caused to be deposited to the credit of an eligible depositor in an account, by the purchase of a time certificate of deposit or otherwise, after June 18, 1963, by persons with certain knowledge and information as more particularly described in said plan, and any amounts credited after June 18, 1963, as interest on any amounts so deposited or caused to be deposited by such persons.

Further comment on the significance of several of the dates noted would be helpful, and is as follows:

The record discloses that June 18, 1963, is the date on which discussions began between officers and trustees of petitioner and a third person relative to its conversion from a mutual savings society to a stock

company, and that after that date several more meetings were held by the same persons at which the subject was further discussed and explored.

October 29, 1964, is the date on which approximately 26,000 copies of a letter were mailed to all depositors over the signature of the president of petitioner, in which they were notified for the first time that the trustees had approved the combining of the facilities of the various banks into one institution to be known as "The Springfield Bank," and notifying the depositors further that qualifying depositors could look forward to participating in the surplus distribution in dissolution, of the remaining assets of the Savings Society, by further advising them that the extent of participation in the distribution would probably be based upon the amount of deposit on the date the letter was mailed, to-wit, October 29, 1964, or on the date of closing of the sale of Society's assets (which was February 9, 1965), whichever was lower. The letter also gave notice of a meeting to be held on December 8, 1964, at which time the transactions involved in the changes would be submitted to the members and depositors for their approval. A summary of the terms of the proposed sale and an explanation and the reasons for the

proposed transactions was likewise included, so that full knowledge of what had happened and what was likely to happen was imparted on October 29, 1964.

February 9, 1965, is the date when petitioner's deposit liabilities were assumed by the Ohio Center Corporation and the Springfield Bank.

Thereafter, on February 20, 1965, the petition before this Court for judicial supervision of the proceedings in dissolution was filed, and the Court in particular was asked to determine the rights of the various types of depositors set forth in the petition and in the plan of distribution which was attached thereto, in and to the surplus fund and the other assets of petitioner and how the shares should be determined and paid, and the Court was asked for further guidance with respect to such other and additional matters with respect to which the Court may wish to order and adjudge.

Upon filing of this petition, the Court issued some orders with respect to a number of matters incident to winding up, which included the matter of the notices which were to issue and the manner in which claims were to be presented, dates were set for a preliminary hearing on claims, objections, statements and stays of action, and several hearings were held with respect to these matters

and proper orders made.

Testimony in connection with certain issues was concluded on May 19, 1965; briefs dealing with the same were ordered filed by June 1, 1965. The issues raised and arising out of the previous filing of various claims and statements were then submitted to the Court for decision on the basis of the record made up of the testimony, exhibits and briefs.

This opinion will therefore concern itself primarily with the determination of which types of depositors shall be entitled to participate in the distribution of the cash surplus of petitioner.

There are few reported cases dealing with the issues before this Court, but it is appropriate to note that many of the questions which have been raised in this case were similarly raised and considered in the case of In re Dissolution of the Cleveland Savings Society, 25 O.O. (2d) 402, which is reported also in 91 O.L.A., page 289. This case arose out of the sale by the Cleveland Savings Society, which was also a mutual savings bank, of its assets to the Society National Bank of Cleveland and the subsequent dissolution of the Cleveland Savings Society and the distribution of its surplus funds.

The Court has carefully considered that decision, and finds itself in general agreement with the reasoning and the conclusions reached in that case. In this opinion reference will be made to it, and for the sake of brevity this Court will refer to it simply as "the Cleveland case."

We come now to a consideration of the several issues to be determined by this Court.

I.

O. S. Kelly Company and one Thomas R. Laudermilk, both of the city of Springfield, Ohio, filed claims seeking to participate in the distribution of the surplus funds as former depositors.

O. S. Kelly Company was a substantial depositor in the Springfield Savings Society from 1952 to 1956. In 1956 the law was changed prohibiting a savings society from accepting deposits from corporations for profit such as O. S. Kelly, resulting in the establishment of the Springfield Society Commercial Bank as a subsidiary of the Savings Society as previously noted.

Kelly accordingly withdrew its deposit from the Savings Society and transferred it to the Springfield Society Commercial Bank. It now claims that, by reason

of these circumstances, its interest in the surplus of the Savings Society has in effect been preserved notwithstanding such change, and that, in view of its uninterrupted and continuous status as a depositor first in the Savings Society and thereafter in the Commercial Bank, it has contributed to the accumulation of the undistributed net surplus and ought therefore be entitled to participate along with all other depositors who may be considered and declared eligible to do so.

Laudermilk was an individual depositor in the Springfield Savings Society from 1943 to 1963, at which time his account was closed. No reason was offered for the closing of the account. He now asserts that his deposit contributed to the prosperity of the bank and was proportionately responsible for the Society's favorable financial condition, and that he ought therefore be entitled to participate along with current depositors in the distribution of the surplus.

This Court finds that there is some merit to these claims, in that each claimant undoubtedly did to some extent at least, by reason of their association with petitioner, contribute to the well-being and prosperity of the Springfield Savings Society. In this respect, however, these claimants may be like hundreds or perhaps

thousands of other depositors who at one time either had deposits in the Savings Society or did business with it and may have withdrawn their deposits or accounts from petitioner for one reason or another, not knowing nor having any reason to anticipate the chain of events which resulted in the dissolution of that institution and the resulting windfall now to be distributed. Indeed, it may be said with reason that every one of the untold thousands who have ever done business with or made a deposit with the Savings Society since its organization in 1873 have in a sense contributed to its affluent position.

Unfortunately, however, neither claimant was a depositor of petitioner at any time after and between October 29, 1964, and February 9, 1965. The issue which the Court has to determine is whether or not either of them are lawfully entitled as former, but not current, depositors to share and participate in the distribution of the surplus fund.

This exact issue was raised and carefully considered in the Cleveland case, and the conclusion there reached may be found in the sixty syllabus of the decision in that case as it appears in 25 O.O. (2d), and is as follows:

"The persons entitled to share in the remaining assets of a mutual savings bank are those persons who have deposits in the bank at the time of winding up."

In the same case as it is reported in 91 O.L.A., the sixth syllabus states the rule more precisely, and it is as follows:

"Surplus in a mutual savings bank is held primarily for the protection of current depositors and not former depositors."

The Court in that case reasoned that the surplus was created and maintained in the main for the protection of existing depositors from loss, and that when any person ceased to be a depositor his interest in the surplus was at an end. Such a person, it held, was no longer liable to contribute to any loss to which the remaining depositors might be subjected, nor had they any right to receive further dividends.

With respect further to the nature of the interest of the depositors of a mutual savings bank upon which their right to share in the surplus fund depends, the Supreme Court of the United States, in the case of Society for Savings in the City of Cleveland v. Bowers, Tax Commr., 349 U.S. 143, stated:

"To maintain their intangible ownership interest they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest."

In the case of Morristown Institution for Savings v. Roberts, a New Jersey case, reported in 42 N.J.Eq. 496, the same issue was being considered, and it was there held that the surplus of a mutual savings bank belonged to current depositors to the exclusion of all those who had withdrawn their deposits at that time. At page 498 the Court in that case stated:

"The State has no right to the surplus. Nor have those who were depositors but withdrew their deposits before the institution of the winding up proceedings any claim to it. The surplus was created and maintained for the protection of depositors from loss by reason of the depreciation of securities, etc., to protect them against the casualties and contingencies to which the funds of the institution were liable and which might impair their deposits. It stood as such indemnity to the depositors who were such for the time being. So long as a person continued to be a depositor, so long it stood for his protection, and when by

withdrawing his funds he ceased to be a depositor, his interest in it was at an end. He thus relinquished his interest in it, and as he would not be liable to contribute to any loss to which the remaining depositors might be subjected, so on the other hand he would not be entitled to any participation in the surplus."

The statements and briefs of both Kelly and Laudermilk fail to cite a single citation or decision of any court holding contrary to the views and decisions above noted.

Thus, while this Court agrees that former depositors and customers of the Savings Society certainly helped it to prosper and thus in an indirect way contributed to building up the net assets of the institution, nevertheless this Court cannot find any legal basis upon which it can properly allow their claims.

The Court rules, therefore, that O. S. Kelly Company and Laudermilk are not entitled to share in the distribution of the surplus funds, and their claims are denied.

Leonard Epstein filed a statement in opposition to the plan of distribution proposed by petitioner. He opened a deposit with petitioner on December 9, 1964, which was only one day after a meeting was held by the depositors and members of the Savings Society to authorize the sale and transfer of all of the assets of the Society and to approve and ratify the actions of the trustees taken in connection with the proposed transactions, of which meeting notice was given in the letter of October 29, 1964, previously described. On that date, to-wit December 9, 1964, claimant deposited \$25.00 by mail, but later increased his deposit so that by December 29, 1964, the balance in his account was \$3,625.00.

In his statement he claims that he was not informed until March 1965 that the petitioner had sold its assets, had voted to dissolve and distribute its surplus to depositors, and that persons who were not depositors prior to October 29, 1964, would not share in the distribution of this surplus. He complains that this denial of his right to participate amounts to illegal discrimination against all persons who became depositors of the petitioner after October 29, 1964, and he asserts that the trustees were required to distribute this surplus

to all who were depositors on the date the Springfield Bank assumed petitioner's liabilities, which was February 9, 1965.

It should be remembered that October 29, 1964, was the date when more than 26,000 copies of a letter (Petitioner's Exhibit B) were sent out to depositors and others, advising that the trustees had approved the various transfers hereinbefore set forth, all of which was previously mentioned in this opinion. Following is part of the exact language contained in that letter:

"In the opinion of counsel, the extent of participation in this distribution will be based upon the amount of deposit on the date this letter is mailed, or on the date of the closing of the sale of Society's assets, whichever is lower. . . . Also, no one making any new or additional deposit before the closing should anticipate that he will participate by reason thereof."

The record on the issue of notices discloses that after October 29, 1964, additional notices to the same effect as that of October 29 were mailed, and that wide general notice of what was contemplated and happening was given to the local community and to the business community throughout the United States. These notices included statements which appeared in the New York Times,

the Journal of Commerce, the Wall Street Journal, the United States Press International, the American Banker, the Savings Bank Journal, and Business Week. These notices also contained the information that depositors after October 29, 1964, were not likely to participate in any distribution of surplus.

The plan before the Court for consideration provides in Item 2 thereof that the term "deposit balance" as therein used means the amount of the lowest credit balance in the account or to the credit of a depositor during the period commencing with the opening of business on October 29, 1964, and ending with the assumption of Society's time and demand deposit liabilities by the Springfield Bank (which took place on February 9, 1965).

This depositor thus takes issue with the two dates which petitioner had set forth in its plan, between which dates a depositor was required to have had funds on deposit in order to participate in the surplus.

In the Cleveland case, the Court adopted a general rule that only persons who were depositors on a single date, to-wit December 31, 1958, the date upon which the Cleveland Savings Society transferred its assets (which date is comparable to the February 9, 1965, date in the instant case), were entitled to share in the

surplus. However, in that case the Court also gave recognition to a factor which similarly is here involved, in that prior to the date of such transfer those who in the Cleveland case clearly had knowledge of the proposed transactions, or were likely to have such knowledge because of ready access thereto, might unjustly profit from such knowledge, and the Court thereupon set an earlier date, to-wit December 1, 1957 (which compares with the October 29, 1964, date in the instant case), subsequent to which no new accounts or increases in old accounts would be considered in sharing surplus.

In the Cleveland case the Court found as a matter of fact that only members, trustees and officers of the Savings Society and the directors, stockholders and officers of the National Bank of Cleveland, the purchaser of the assets of the Savings Society, might have had some knowledge as early as December 1957 of what was happening, all because the negotiations were, in the words of the Court, "a well-kept secret." The Court in that case thus barred the above designated persons from participating in the surplus to the extent of any new or increased accounts opened by any of them after December 1, 1957. However, the Court in that case discussed the possibility of such knowledge also on the part of

third parties, but the record in the Cleveland case being devoid of any evidence of such knowledge on the part of third persons, the Court found that there were no parties other than the officers, members and trustees of the banks involved who had any access to any knowledge of what was being considered, and for that reason made no finding with respect to any parties and persons other than those noted.

The negotiations in the instant case, however, were in the first instance not kept so secret, as will later be noted, and when on October 29, 1964, they were made public, the limitations upon the right to participate in the surplus funds were then clearly stated.

The rule found by the Court in the Cleveland case to be applicable to situations of this kind is stated in 7 O.J. (2d) 1965 Cumulative Supplement, at page 62:

"The intangible ownership interest in a mutual savings bank for any depositor is the proportion his deposit balance bears to the aggregate of the deposit balances of all depositors, and any remaining assets on dissolution are distributed on such pro rata basis on the dates set by the Court as determining dates for such

distribution."

The Court in the Cleveland case also took cognizance of the fact that the cutoff date determined upon in that case worked hardships on some, and that it created windfalls for others. The Court went on to add, however, that "the same would be true if any other date were selected."

This Court therefore finds that the plan of distribution as submitted by petitioner, in so far as it is limited in the first instance to depositors who were such between October 29, 1964, and February 9, 1965, is prudent and reasonable and, considering the circumstances and the events that transpired, the determination of these dates was necessary and just in order to assure a proper and equitable basis upon which to divide the surplus fund.

With respect to his claim that he was not informed until March 1965 of the limitations to be imposed on the right to share as above noted, the Court finds that this depositor did have knowledge of the same. This Court is also of the opinion that, even if depositor had no actual knowledge, in view of the widespread notices given after October 29, 1964, his ignorance of these limitations would not prevent their application to him.

Certainly it would be manifestly unjust to

deny Mr. Laudermilk, a long-time depositor, who had but recently closed his account unaware of what was impending, the right to participate in the distribution of the assets, yet at the same time permit this depositor, who the Court finds had actual knowledge of what had happened and of what was to occur, to share in the distribution of the surplus, in spite of the notices widely circulated that depositors in his category would not be permitted to participate. It may also be noted that if he were allowed to share in the distribution of the surplus in spite of the notices given and in spite of the proposed plan, any person who opened a new account or increased his old one after notice of the transactions was given on October 29, 1964, would similarly be permitted to share in the surplus, and the results would be so unfair, unjust, and such unwarranted reward for sheer and patent speculation as, in the words of petitioner, "to shock the conscience."

This claimant dismisses the latter possibility as a "horror tale." In fact, one who reads his vigorous statement and reply memorandum might conceive an image of him as an unsuspecting, naive and gullible victim who was sold a ticket to a banquet but is not permitted to sit at the banquet table. This is an image

difficult to accept. The record discloses that this claimant is a member of a New York law firm and is one of three lawyers from that same firm who made deposits earlier with petitioner and had early access to information about the petitioner's intention to sell its assets and that a potential windfall was in store, under circumstances which are more fully discussed in the next numbered item which immediately follows in this opinion.

In the opinion of this Court, none of the citations submitted by depositor in support of his position warrant the conclusion he urges, nor is there anything in the statutory law of this State or in any Federal regulations, law or decision which would require or justify the Court to so hold.

The Court therefore finds as a matter of fact that this depositor had actual knowledge on December 9, 1964, the date of his initial deposit, of the proposed sale and the likely distribution of petitioner's assets.

The claimant not being a depositor on October 29, 1964, the Court finds that he is not entitled to share or participate in the distribution of the surplus fund.

The case of fourteen depositors:

The plan of distribution submitted by petitioner contains the following provisions:

"2. The term 'deposit balance' as used herein means . . . etc. . . . ; provided, however, that any amount deposited or caused to be deposited to the credit of a depositor in an account, by the purchase of a time certificate of deposit or otherwise, after June 18, 1963, by a depositor having knowledge or information that the officers or trustees of the Society had discussed with individuals not associated with the Society the possibility of terminating the activities of the Society as a mutual savings bank by a sale or transfer of assets or otherwise, or that officers of Transcontinental Investing Corporation or of an unidentified investing corporation with extensive holdings in Ohio had expressed an interest in exploring the acquisition of the Society and its subsidiary commercial banks, and any amounts credited after June 18, 1963, as interest on any amounts so deposited or caused to be deposited, shall be excluded in determining the

amount of the lowest credit balance in an account or to the credit of a depositor or the face amount of such a time certificate of deposit."

The record discloses that before the sale and transfer of petitioner's assets actually took place, and more specifically between August 1963 and May 1964, between fifty and sixty deposits were received by petitioner from persons and organizations outside of Ohio who had no previous association or history of association with either petitioner or this community.

The record further discloses that the first serious indication of an interest in terminating the activities of the petitioner as a mutual savings bank by sale or transfer of assets or otherwise was made manifest on June 18, 1963. On that date a certain securities broker and financial analyst who made a specialty of studying and analysing financial institutions and in particular mutual savings societies, and who was familiar with the proceedings in the dissolution of the Cleveland Savings Society, came to Springfield and discussed with officers and trustees of petitioner the possibility of terminating the activities of the petitioner as a mutual savings bank.

The record discloses that following such

discussions he determined there was a strong likelihood that the petitioner would sell and transfer its assets, thereby creating a cash surplus which would be distributed. Thereafter, on December 5, 1963, this same broker introduced to the officers and trustees of the petitioner persons who were officials of the company which subsequently purchased the assets, and then, as a broker, he helped to negotiate the actual purchase and transfer of petitioner's assets, for which latter services he was reimbursed by the purchaser.

However, between June 18, 1963, and December 5, 1963, and before the negotiations between buyer and seller for the purchase of petitioner's assets were formally undertaken, this same broker, without the knowledge or consent of petitioner, had notified by letter and otherwise a large number of persons, including his partners, his clients and prospective clients and their friends, of the likelihood of the conversion of petitioner from a mutual savings bank, and recommended to these people that they make deposits of any of their "idle funds" so that they might participate in the cash surplus should a sale be consummated, even though the current rate of interest would be lower than they could receive elsewhere. He also conveyed this information

to a number of security brokers in Philadelphia and New York. At a hearing held in this Court dealing with this very matter, the broker appeared and testified under oath as a witness substantially as hereinabove related.

The record further discloses that petitioner took notice of these unusual deposits and called the same to the attention of the broker, and at the instance and urging of petitioner, and beginning in November 1964, the broker contacted each of these depositors and made an effort to persuade them to withdraw their accounts, advising them that he had doubt as to the legality of their deposits, and advising them further that they would not be allowed in any event to participate in the distribution of the cash surplus. Most of these depositors followed his advice and withdrew their deposits, but fourteen of them failed and refused to do so.

On May 19, 1965, a hearing was held for the specific purpose of considering the right of these depositors to participate in the plan, after notice had first been given to each of them of the hearing. None appeared in person, but two were represented by counsel.

At that hearing, the broker, appearing as a witness, was able to trace and identify each of the fourteen deposit accounts, and his testimony was to the

effect that in each instance the deposits resulted from the information which he gave to the sources and in the manner above described, and that these deposits were made in reliance on an anticipated windfall. He could offer no other explanation or reason as to why any of these persons or organizations from out of the State would make their deposits in a Springfield bank.

Thus it is clear that these fourteen depositors had "inside" information which was received directly or indirectly from a broker who was then discussing with officers of the Society the possibility of terminating the activities of the Society as a mutual savings bank, by a sale or transfer of assets or otherwise, or that certain companies had expressed an interest in exploring the acquisition of the Society and its subsidiary banks, and, acting upon that information, they made their deposits in the hope of reaping a windfall that was to follow.

Petitioner contends that, by reason of these facts, the provisions of Item 2 of the plan of distribution above set forth is applicable to each of these fourteen depositors, and that they should be excluded from participating in the distribution of its assets.

It should be emphasized that the information

upon which these depositors acted was not culled from financial statements or based on documents or announcements relating to the financial condition of petitioner and available to all potential investors alike. It came to them in the manner above described, and there is no credible evidence in the record to the contrary.

The Court is aware that, by the ordinary standards which apply to the "market place," what happened as above related may be considered normal and proper, and the Court sees no need to make further comment on the ethical considerations that may be involved. However, it must be remembered that we are not dealing here with the practices of the "market place." Banks are in a different and special category. They provide the life-blood for our economy. The stability of the whole community may be undermined by any suspicion of manipulation or speculation in any of its affairs. That banks enjoy this special status may be attested by the many laws which zealously guard banks and which deal with and regulate their most detailed operations. By law they are subject to strict and frequent inspection, examination and regulation. Ohio statutes even make it a criminal offense to make any false statements or to circulate any rumors affecting the solvency of banks or

their earnings and management.

It should be noted that the trustees of the Springfield Savings Society, undoubtedly mindful of the sensitive nature of their position and anxious to avoid any suspicion of unjust enrichment accruing to themselves by reason of their access to confidential information, voluntarily renounced for themselves, their wives, and any of their children who lived with them after June 18, 1963, the right to participate in the surplus fund.

These fourteen depositors differ from the trustees only in that they themselves were not officers of petitioner or related to them, but they are otherwise alike in that they became privy to the same confidential information accessible to the others on June 18, 1963, and thereafter, and before the same became a matter of public knowledge.

Incidentally, the Cleveland case recognized the validity and logic of this reasoning and disqualified from participation those persons who became depositors after the negotiations for the sale of the Cleveland Savings Society began or increased their deposits after that date, on the ground that, having had information as of that date, they were barred. As previously noted, the record in the Cleveland case discloses that only

members and trustees of the two banks in Cleveland fell in that category, and thus there was no need in that case to consider the effect of this knowledge on any other persons.

This Court is of the opinion that the same reasons which led to the disqualification of the trustees and members of the Cleveland banks, and which by the voluntary action of the trustees of petitioner bars them and their families from participating, applies with equal weight to the fourteen depositors under consideration.

The Court wishes to observe that the petitioner could have remained silent with respect to these depositors, and perhaps no knowledge of the circumstances attending their deposits would have become available to the public or to the Court. The total amount of money involved in so far as the fourteen depositors under consideration and their proportionate share of the surplus are concerned would not greatly diminish the share that any one depositor would otherwise receive.

The relationship between a mutual savings bank and its depositors is not merely one of debtor and creditor, but one of agent and principal as well. This relationship was defined as long ago as 1896 by the then Circuit Court for this very district in a case, oddly

enough, involving the same petitioner but concerned with issues unrelated to those in the instant case. The Court refers to Collett, Treas. v. Springfield Savings Society, 13 O.C.C.R. 131. The Court in that case discussed the reasons for the existence of mutual savings societies and concluded that, while the relation of bank and general depositor is simply the ordinary one of debtor and creditor, "the relation of savings society, such as defendant, and depositor is that of agent and principal." It is elementary that an agent is regarded as a fiduciary, and the relationship between agent and principal is one that implies trust and confidence and unqualified exercise of loyalty, fidelity and good faith in the execution of its responsibilities. (See 2 O.J. (2d) 168, etc.)

The matter of these fourteen depositors was undoubtedly brought to the attention of the Court out of a sense of duty and the responsibility to its family of depositors, and the Court wishes to commend petitioner, its trustees and officers for their zeal in investigating and pursuing and presenting this matter as it did.

The Court wishes also to state that no criticism or slur is intended for any of the fourteen depositors, who, as far as the record discloses, acted in good faith and seized an opportunity to make what was

represented to them to be a highly lucrative investment. They are not being penalized by any decision reached by this Court. Their accounts are secure, and they, together with all other depositors, are entitled to receive and keep the interest accumulated to their accounts.

However, the Court does find that each of the fourteen depositors did have knowledge or information that the officers or trustees of the petitioner had discussed with individuals not associated with the Society the possibility of terminating its activities as a mutual savings bank and knew that the officers of an investing corporation had expressed an interest in exploring the acquisition of the Society, and that their deposits were made as a result of such information and for the sole purpose of speculating upon the possibility of participating in this surplus, and were not made within the usual and normal course of business.

With respect to these fourteen depositors, therefore, whose names are listed on Exhibit 1 filed at the hearing on May 19, 1965, all of whom opened regular savings accounts in the Springfield Savings Society after August 7, 1963, the Court rules that, under and by virtue of the provisions of Item 2 of the plan of distribution adopted by the trustees of the Savings Society--which

provision the Court finds reasonable and proper--all of the deposits made in petitioner by said depositors and all amounts credited as interest thereon shall be excluded in determining the amount of the lowest credit balance in each account to the credit of any said depositor.

In short, the Court rules that none of said depositors may share in the cash surplus assets of petitioner.

4.

The City of Springfield claims the right to participate in the distribution of assets and to a proportionate share of the same, and the Board of Commissioners for Clark County makes similar claim. They each point out that they had substantial deposits with petitioner at the times and between the dates set forth in the plan, and that they had no prior knowledge of any of the events that have transpired so as to disqualify them from participation.

The plan for distribution under consideration by the Court notes, among other depositors:

"(B) Governmental authorities for whose account the Society held moneys pursuant to the Uniform Depository Act of the State of Ohio con-

tinuously during the period commencing with the opening of business of Society on October 29, 1964, and ending with the assumption of Society's time and demand deposit liabilities by Bank."

The deposits of both these governmental bodies are governed by the provisions of chapter 135 of the Revised Code of Ohio, often referred to as the Uniform Depository Act. Section 135.16 R.C. requires the treasurer of either the city or the county involved to secure from the depository a pledge as security for repayment of the deposit, eligible securities having an aggregate market value equal to the excess of the amount of public moneys so deposited over and above the amount of Federal deposit insurance. (Presently the amount of such insurance is \$10,000.)

Pursuant to this requirement, petitioner has secured each of these deposits by pledges of government bonds having a face value in excess of the amount of deposit.

These governmental bodies thus enjoy privileged positions with respect to their deposits. In the event of liquidation and in the further event that an insufficient amount of money was available to repay these depositors, the securities pledged for their repayment

could be sold and the claims satisfied. Thus, unlike the regular depositors, neither the City of Springfield nor the Board of Commissioners was subject to the normal risks and hazards assumed by other depositors. It is this distinction which led the Court in the Cleveland case to rule as follows:

"Public funds were held by Society for the account of certain municipal corporations pursuant to special written contracts which were governed by the provisions of the Uniform Depository Act of the State of Ohio. These contracts provided for the payment of a fixed rate of interest, the repayment of all money held, and were fully secured by obligations of the United States of America. In light of the distinctive nature of these deposits, as contrasted to the regular savings deposits in Society, this court finds that this class of depositors shall not be entitled to share in the distribution of the remaining assets of petitioner."

This Court finds that it is compelled to agree with the logic and reasoning of this ruling, and in accordance therewith therefore rules that neither the City of Springfield nor the Board of County Commissioners

is entitled to share in the distribution of the assets of petitioner.

5.

The Ohio Center Corporation has filed a statement asserting a contingent claim against petitioner. Nathan and Mary Harris have also filed a claim based on personal injuries resulting from an accident allegedly occurring on petitioner's premises. These claims were considered and were disposed of in separate orders previously made by this Court. It is therefore not necessary at this time to render any further decision with respect to them.

6.

The petition calls attention to the several classes of depositors whose status and right to participate in the distribution of petitioner's assets need to be determined. Among these deposits are those pursuant to Christmas Club plans, deposits held subject to specific instructions in writing with respect to the use and disposition thereof and who may be referred to as "escrow fund depositors;" deposits in accordance with the terms and provisions of the various types of loan agreements which required the borrowers to pay certain sums at stated

intervals to be accumulated and applied to the payment of interest and installments of principal, taxes, etc., which may be referred to as V.A., F.H.A., and hypothecated fund depositors; deposits held subject to disbursement on demand or written order or for whose account the Society had issued for value official checks or other negotiable instruments prior to closing and which were outstanding at the time of closing.

It should be noted that no interest or dividends were paid or payable on such accounts, and no passbooks were issued to evidence the same.

In the Cleveland case, at pages 419-20, the Court indicated that there were four factors which should be considered in determining who is entitled to share in the distribution of surplus, as follows:

"Only those persons who indicated an intention to become regular savings depositors, who received savings passbooks as evidence of their property interest in Society, who were entitled to receive dividends rather than interest, or nothing, whose right to withdraw their funds was determined in accordance with the regulations and rules relating to deposits, had intangible ownership interests in Society."

The Court went on to rule that:

"Persons owning or interested in Christmas Club accounts, escrow accounts, Employees' United States Savings Bond deposits, funds held for borrowers, borrowers' construction loan funds, hypothecated deposits on installment loans, outstanding certified checks, outstanding checks, and official checks did not meet the requirements necessary to create an intangible ownership interest. Contracts with such persons were special contracts which distinguished them from regular savings depositors. They had no savings passbooks in Society, received no dividends from Society, and their right, if any, to demand payment of such funds was determinable in accordance with their special contracts or general law and not governed in any way by the regulations and rules relating to deposits. Therefore, this court finds that these persons, or classes of persons, shall not be entitled to share in the distribution of the remaining assets of petitioner."

This Court agrees with the conclusions above reached, and it is the ruling of this Court that those deposits described and set forth in the first paragraph

of Item 6 of this opinion do not share in the distribution of petitioner's assets.

It is the further ruling of this Court that all remaining deposits and depositors, being either regular depositors, school depositors, or certificate holders, do meet the requirements and the standards set forth above and that they are entitled to share in the distribution of petitioner's assets.

The plan of distribution submitted to this Court is therefore approved, subject only to the decisions rendered by this Court on the several issues above noted and numbered 1 to 6 inc.

The Court orders and directs that distribution in cash of petitioner's assets shall be made not later than September 1, 1965, unless distribution on such date shall be prevented and made impossible by an appeal of the decision of this Court by any one of the parties to this action.

Petitioner is directed to prepare and submit to this Court for its approval, within the rules of court governing the preparation of journal entries, a proper journal entry making final determination of the several issues herein considered in the manner herein set forth.

Such journal entry, however, shall reserve to this Court full jurisdiction of all other matters which may hereafter arise in connection with the execution of the plan of distribution or anything else incident to the dissolution proceedings, excepting the issues herein considered and determined.

cc:

MESSRS. DUNBAR, KIENZLE & MURPHEY, Columbus, Ohio, and
MESSRS. COLE, COLE & HARMON, Springfield, Ohio,
on behalf of Petitioner

JAMES A. BERRY, ESQ., Prosecuting Attorney for Clark
County, on behalf of Clark County Board of Com-
missioners

CHARLES E. CARTER, ESQ., City Solicitor,
on behalf of The City of Springfield, Ohio

LEONARD EPSTEIN, ESQ., 425 Park Avenue, New York, N.Y.,
on behalf of self

MESSRS. BAILEY & DOUGHTY, Springfield, Ohio,
on behalf of H. F. Usden and Albert Kraftschick

GEORGE R. BRIDGMAN, ESQ., London, Ohio,
on behalf of O. S. Kelly Company

THOMAS R. LAUDERMILK, ESQ., 636 Snowhill Boulevard,
Springfield, Ohio, on behalf of self

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

SIDNEY ELLIOTT, et al.,)

Plaintiffs,)

v.)

No. 63-1072-PH

FEDERAL HOME LOAN BANK BOARD,)

et al.,)

Defendants)

EQUITABLE SAVINGS AND LOAN)

ASSOCIATION,)

Plaintiff,)

v.)

No. 63-1107-PH

SIDNEY ELLIOTT, et al.,)

Defendants)

SIDNEY ELLIOTT, et al.,)

Plaintiffs,)

v.)

No. 63-1230-PH

FEDERAL HOME LOAN BANK BOARD,)

et al.,)

Defendants)

MEMORANDUM AND ORDER

ON ATTORNEYS' FEES

Two of the above actions were filed on September 10, 1963, the effective date of the merger of Long Beach Federal Savings and Loan Association, a federally chartered institution, into Equitable Savings and Loan Association, a California stock organization. The

other one was filed September 17, 1963 and transferred to this court.

As a result of the merger, a block of 791,650 shares of Equitable stock on the date the merger was consummated, viz., September 10, 1963, was available for distribution to Long Beach depositors as surplus, bonus, or net value, of the Long Beach Association. That is to say, Equitable agreed to assume the liability to each depositor of Long Beach for the total amount of each deposit, as well as all liabilities of Long Beach, and to distribute to the depositors^{1/} collectively 791,650 shares of its stock.

All of the suits, in effect, sought the same relief, viz., to have said 791,650 shares of Equitable Association's stock deposited in court, distributed according to the terms of the statute, the by-laws of Long Beach, the Settlement Agreement of February 14, 1962, and the passbooks issued to the shareholders of Long Beach, share and share alike rather than an unequal distribution "insisted" upon by an imprimatur of the Bank Board. Motions by each party for summary judgments were consolidated and plaintiffs' motions were granted. See 233 F. Supp. 578 for the court's opinion. Judgment on that opinion, which also served

1/ The market value at merger time of the total block of 791,650 shares was between \$9,250,000 and \$9,500,000 or about \$12 per share. The market value on the dates of the hearings (June 1965) on the within motions was between \$5 and \$6 a share. The book value on the latter date was approximately \$8 per share.

findings of fact and conclusions of law, was made and entered
17, 1965.^{2/}

On March 23, 1965, Charles K. Chapman, who represented the Long Beach Federal Savings and Loan Association since the inception of the litigation involving the Long Beach seizure, twenty years ago in 1946, and George W. Trammell, who represented the Shareholders' Protective Committee of the shareholder-depositors of Long Beach Federal Savings and Loan Association from 1960 (following Wyckoff's takeover who died in 1956 and others who had previously represented them), filed a joint Petition and Motion for Partial Allowance on account of Attorneys' Fees.

The Petition sought fees only to the date (October 29, 1963) of the consented judgment for partial distribution of 700,000 of the total shares on deposit in court, but at the suggestion of the court the application was expanded to include services to and in connection with the entry of judgment by this court in the within cases on March 17, 1965 (not including any appeal or services of any kind after March 17, 1965).

Due notice of the motion was given by first class mail to all the shareholder-depositors of Long Beach and all counsel involved. The motion came on for hearing, and was heard by this court on

The lapsed time between the date of the opinion, September 22, 1964, and the date of the judgment, was occasioned by the immense amount of calculations required on approximately 60,000 share accounts of Long Beach.

June 22, 23, 24 and 25, 1965. Nobody appeared in opposition to the application for attorneys' fees except the Government agencies represented by Government counsel. One shareholder, who had long since withdrawn his funds and who was entitled to receive approximately 100 shares of Equitable stock, appeared and said he objected, but he offered no testimony or evidence of any kind and did not remain at the hearing. What he "objected" to is still not of record or disclosed to this court. But among 60,000 shareholders it is only normal that you must expect at least one objector. The Government agencies appearing in the case offered no testimony or evidence of any kind and did nothing more than cross examine the witnesses who were produced by the petitioners. The petitioners produced evidence oral, documentary, and factual, as well as expert opinion testimony. At the conclusion of the hearing the matter was submitted.^{3/}

In addition to the original petition and motion for partial allowance of attorneys' fees, the petitioners filed a 128-page Affidavit reciting their services. No affidavits countering the Affidavit were filed. Upon stipulation of counsel, approved by order of the court, that Affidavit was admitted in evidence as direct examination of Mr. Chapman and Mr. Trammell.

It is unnecessary to repeat here either the facts set forth in that Affidavit or the recitations which this court has made in its previous opinions of the long history of this litigation except

^{3/} An intervening tour of duty on the criminal calendar of the Court prevented attention to this matter until now.

so that it began 20 years ago in May 1946 by the seizure, without notice, of the Long Beach Federal Savings and Loan Association, which resulted in much litigation concerning that seizure as well as the seizure and dissolution (also without notice) of the Los Angeles Bank of the Federal Home Loan Bank Board. One threatened seizure was later enjoined, and another one occurred in 1960, also without notice. All of these seizures were marked by bitterness, refusal of the Government officials to give receipts for cash and other negotiable securities, multi-million dollar runs of withdrawals by depositors, constant, varied and seemingly continuous and interminable litigation,^{4/} and three congressional investigations resulting in reports covering several thousand printed pages, and also resulting in drastic changes in the law.

The picture seemed somewhat to brighten in the early part of 1962, when, on February 14, 1962, a Settlement Agreement was entered into between the Long Beach Federal Savings and Loan Association and the Federal Home Loan Bank Board which called for dismissal of all litigation and what amounted to payment of \$5,000,000 in damages to

^{4/} There were 27 cases in the Federal court, and 11 in the State court, and more than 450 pages of docket entries. Aside from the many unreported findings and orders, more than 400 pages are required in the official printed volumes of reports to cover the many opinions written involving this litigation. About 200 pages were written by me and it is unnecessary to repeat them or even summarize them. To grasp the scope and complexity of this litigation or the extent of petitioners' services one should read all the reported opinions, at least.

the Long Beach Association, and the approval of a merger between Long Beach Association and the Equitable Savings and Loan Association. Due to the many complications involved, it took some time to implement that agreement. This court, in the exercise of its duty, deemed it necessary to notify by publication and direct mail all the depositors and shareholders of Long Beach, which entailed a tremendous job of printing and mailing. The Settlement Agreement was finally approved (the appearances in opposition to it were less than five, and none of them offered any ground), and on April 2, 1962 the Association returned to its original management.

According to the uncontradicted evidence before the court, Attorneys Chapman and Trammell had in the meanwhile, since 1958, been working together with the officers of both the Long Beach Association and the Equitable Association looking towards a merger of Long Beach into Equitable. Arrangements for the financing, of \$5,500,000, for the conversion and merger of Long Beach into a mutual association had been completed, and the State examiners were in the Long Beach Association conducting the audit required for such conversion when the Board again, in April 1960, seized the Association without hearing or notice. The financing withdrew when the April 1960 seizure took place, which required everybody to start over on merger plans. A merger between Long Beach and Equitable was approved in the Settlement Agreement. But, according to the uncontradicted testimony, within about six weeks from the date the Association was returned (April 2, 1962), the Federal Home Loan

Board attempted to renege on their approval of the Settlement Agreement and began to throw obstacles in the way of any merger. The Board, in absolute contradiction to the specific terms of the Settlement Agreement, insisted on other than pro-rata distribution of surplus of Long Beach. Another congressional investigation followed and, according to the uncontradicted testimony, it required the almost daily services of Attorney Chapman to be in contact with the changing phases of the merger and the numerous resulting problems encountered, such as, for instance, increasing the capitalization of Equitable in order to be able to receive Long Beach in a merger, repeated drafting and redrafting of the merger agreement, the supervision of accounting, securing of appraisers, a thorough examination of tax consequences, stockholders' meetings, drawing proxies, and many others,^{5/} which, as above stated, compelled the almost constant attendance and advice of Attorney Chapman, and the occasional advice and contact of Attorney Trammell representing the shareholders, in order to effectuate the merger agreement which was finally executed under date of June 12, 1963, more than a year after the Association had been returned, and was effected on September 10, 1963.

The three instant suits are the result of disputes which arose during the course of the merger agreement concerning the insistence

/ Illustrative of how wide-ranging counsel's services were, was its participation in the conversion of Bellflower Savings & Loan into a California State association, and then its merger with Equitable, as part of the ultimate plan in merging Long Beach and Equitable.

by the Bank Board, contrary to the Settlement Agreement it executed first, to eliminate from any share of the surplus all depositors with more than \$100,000 after the April 22, 1960 seizure, and their subsequent "insistence" to eliminate from any share of the surplus those having more than \$10,000 on a new deposit after April 22, 1960, as well as every shareholder, regardless of the size, who had pledged his account (passbook) on a loan,^{6/} and other restrictive things. These things are more fully covered in the Memorandum Opinion above referred to, which is reported in 233 F. Supp. 578.

Further recitals could be made concerning this unbelievable litigation, but I will refer anyone who gives consideration to the matter to the more than 400 pages of printed opinions which appear in the reports of this court and the appellate courts, the titles and citations of which are set forth more particularly in footnote No. 6 of 233 F. Supp. 578, and to the above-mentioned joint Affidavit of Chapman and Trammell.

Numerous cases are cited by the petitioners in support of the position that they are entitled to attorneys' fees. As the judge has sat through countless days and many nights in hearings, research and opinion writing over a 20-year period, I am thoroughly familiar

6/ There were 324 shareholder-depositors with accounts of \$500 or less, each of which was pledged as security for a loan against the account. It would be a prohibitive burden on any or all such small accounts to have undertaken litigations against the Bank Board and Insurance Corporation to enforce their pro-rata rights to the surplus plus of Long Beach.

th the work done and the ingenuity and skill and persistence required of the attorneys for the petitioners here, as well as the stubborn persistence and ingenuity of Government counsel in creating administrative and legal obstacles. There can be no doubt that the petitioners are entitled to a decent compensation.

Many cases are cited in support of the various elements to be taken into consideration in fixing attorneys' fees especially where they are dependent upon a contingency. Perhaps the most succinct are Angoff v. Goldfine (1 Cir., 1959), 270 F. 2d 185, and Twentieth Century Fox Film Co. v. Goldwyn (9 Cir., 1964), 328 F. 2d 190, cert. n. 379 U.S. 880, the pertinent portions of which are quoted in footnote 7.

Angoff v. Goldfine, 270 F. 2d 185 (1 Cir., 1959), pages 188-189:

"[3] . . . the following factors are to be carefully considered and weighed in fixing the amounts of compensation to be awarded in cases of this sort. These factors are: the amount recovered for the corporation; the time fairly required to be spent on the case; the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this. And these criteria have frequently been spelled out by the courts. . . ."

and further at page 190:

"[5, 6] . . . if that [prior] proceeding in fact produced a benefit to the corporation on behalf of which the main action was brought, we fail to see why that benefit should not be considered in fixing counsel fees and expenses in the main action, for we do not think an attorney's compensation should

7/ Continued.

be made rigidly to depend upon the precise means by which a fund is recovered for a victimized corporation.

" . . . an attorney is entitled to an award of compensation based on benefits obtained by a corporation as a result of his efforts short of bringing suit"

and at page 191:

" . . . it was established long ago that agreements to pay a contingent compensation for professional legal service of a legitimate character is not in violation of federal law or public policy, even when prosecuting claims against the United States. *Stanton v. Embrey*, 1876, 93 U.S. 548, 556, 23 L.Ed. 983; *Taylor v. Bemiss*, 1884, 110 U.S. 42, 36, 3 S.Ct. 441, 28 L.Ed. 64"

The Ninth Circuit in Twentieth Century Fox Film Corp. v. Goldwyn, 328 F. 2d 190 (9 Cir., 1964), cert. den. 379 U.S. 8, set forth some of the same factors in the following language, p. 221:

"[31] . . . these factors [value of attorneys' fees] include (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar--both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiffs prior to trial, (8) whether it would be reasonable for counsel to charge a victorious plaintiff, and (9) what contribution shall be made by the defendant toward the fees of plaintiff's counsel.

"While all or most of these factors are useful as guides in fixing such fees, they provide nothing approaching a precise yardstick. In the long run, the weight to be accorded to each and other factors in fixing the fees in a particular case must rest largely upon the good judgment of the district court."

" . . . They [defendants] do question the necessity for much of this work. However, this is almost like saying that plaintiff could have won more easily--a not very telling argument when made by those who contend that plaintiff should not have won at all.

"The lawsuit was most vigorously contested from beginning to end. Numerous complex legal and factual issues were involved"

In the last case it is noted that while the factors mentioned are useful as guides in fixing such fees, they provide nothing approaching a precise yardstick. In the long run the weight to be accorded these and other factors in fixing the fees in a particular case must rest largely upon the good judgment of the district court."

In view of the very unusual nature of the litigation and the services involved in this case it is difficult to apply precise standards. The Ninth Circuit stated (11 years ago) that.

" * * * we have pointed up in our opinions that its unique and unprecedented pattern is without a counterpart in the books. No reported case or controversy has been called to our attention which even remotely resembles it. * * * It is our considered judgment that it would be impossible to find in the books a more unique, confusing and extraordinary pattern of litigation or one more shot through and through with 'exceptional circumstances.' * * *" Federal Home Loan Bank, et al. v. Hall, et al. (9 Cir., 1955), 225 F. 2d 349, at 368, n. 8.

The petitioners' services began in 1946 and involved litigation concerning not only the seizure of the Association but the dissolution of the Los Angeles Federal Home Loan Bank and its transfer to San Francisco. All involved a stupendous amount of work of almost every conceivable kind in connection with those proceedings, and even the transfer back to the officers of the Association from the Home

Loan Bank Board required this court to lay down procedures involving very great efforts in unbelievable detail in the matter of returning the Association in 1948. To give a small idea of what the first litigation amounted to, the court appointed a special master to oversee depositions and the turn-back and allowed him \$90,000 as a fee therefor which was approved by the appellate court.

After that there was again another threatened seizure and further litigation enjoining it. There were three congressional investigations; there was an effort to get the Association out of the federal system so as to merge it with Equitable which involved going through the California Savings and Loan Commissioner, requiring intricate proceedings, exhaustive factual and legal examination and the like. During the process, there was again the second seizure in 1960, following which there was another congressional investigation.^{8/}

8/ Exhibit 24 is a printed copy of House Report No. 2083, "Federal Home Loan Bank Board Seizure of Long Beach Federal Savings and Loan Association."

The Findings of the Committee appear on pages 19 and 20 thereof and read as follows:

"FEDERAL HOME LOAN BANK BOARD--LONG BEACH SEIZURE
"FINDINGS

"The subcommittee finds as follows:

"(1) The Board members were uninformed about many matters of regulatory policy and administrative routine governing their own Board's operations. They relied excessively on legal and supervisory staffs for information and advice on matters which ordinarily should be within their own competence.

"(2) The Board members and supporting witnesses were unacquainted with many facets of the Long Beach Federal controversy even though it has taken a large portion of their time and attention. The findings which the Board

Continued

made as the basis for summary seizure presupposed a knowledge of facts and circumstances which the Board members did not possess.

"(3) The Board's inability to inform the subcommittee on many matters was compounded by its unwillingness to testify on others, based upon various claims of privilege. In the first instance, the Board entered a general refusal to testify and challenged the propriety of the subcommittee's inquiry by claiming judicial privilege. In the course of the testimony several variants of executive privilege also were claimed.

"(4) Notwithstanding that privilege is a highly personal and nondelegable matter, Board Chairman Robertson was unacquainted with the legal basis of his claim and was unable to amplify or illumine in any particular a prepared statement which he read to the subcommittee in asserting the claim of judicial privilege. Upon examination of the legal and other citations in the statement, the subcommittee found no grounds whatever for the claim.

"(5) To justify summary seizure of Long Beach Federal without prior notice, the Board was required to determine that an emergency existed. The charges cited by the Board as the basis for the seizure order dated back 11 or 12 years in some instances, 2 or 3 years in others, and in any case involved matters which were known to the Board or its supervisory staff and discussed with the association from time to time. The record shows that the Board had discussed the possibility of seizing Long Beach Federal over a period of years but did not decide to take such action until after it learned that the association had applied for a State charter.

"(6) Some of the charges cited in the Board seizure order concerned matters in pending litigation, and for the association to comply in the manner sought by the Board would have required the association to prejudice its own position in the litigation.

"(7) If any or all of the charges cited in the Board seizure order were valid and justified, then the Board was derelict in its duty in failing to issue explicit supervisory letters or 'stop' orders and require compliance over the course of time which encompassed the matters charged.

"(8) The Board would have been derelict in its duty even if an emergency had existed, since these charges should not have been allowed to accumulate. However, it

is very clear that an emergency of the type contemplated in the 1954 amendments to the National Housing Act (12 U.S.C., sec. 1464) did not exist. Summary seizure was chosen as one of several supervisory techniques, as 'the better way to handle it,' and for this reason the Board's action was an arbitrary and unlawful exercise of power.

"(9) A better explanation of the summary seizure action was the Board's unwillingness to permit Long Beach Federal to convert from a Federal to a State-chartered association, which conversion is permitted by law. The seizure order came on the heels of an application by Long Beach Federal to the California State authorities for conversion and a subsequent examination by State examiners, which was interrupted by the seizure action.

"(10) The Board contemplated, when it directed the seizure, that there would be a 'run' on the association by depositors, and it arrange in advance for a \$30 million loan by the Insurance Corporation to the association. At the time of the hearings, 6 weeks after seizure action, approximately \$37 million had been withdrawn from the \$96 million association.

"(11) The Board exercises its regulatory powers largely by informal conferences, conversations, and correspondence and by threats to exercise more drastic methods if corrective actions decided by the Board or its supervisory staff are not taken. These informal methods of regulation largely unrecorded and lacking procedural uniformity, place a vast machine of personal power in the hands of the Director of Supervision, who supervises more than 1,800 Federal associations.

"(12) The Board has ignored the intent of Congress and the plain meaning of the law in failing to formally notify the association of alleged violations of laws and regulations and give it opportunity to take corrective action. In the 6 years since the Congress provided for such administrative action, the Board has utilized this procedure in only a single instance. The congressional enactment has fallen in a crack between informal, personal supervision on the one hand and drastic seizure on the other.

"(13) The supervisor in charge of Long Beach Federal acted arbitrarily and unfairly in summarily discharging more than a score of employees without allowing sufficient time to review their capabilities and loyalties. Further, the importation of employees from other savings and loan associations, which were competitors of Long Beach Federal was unwarranted and the prejudicial to the interests of Long Beach Federal.

"RECOMMENDATIONS

"Notwithstanding the lack of cooperation on the part of the Board witnesses, the subcommittee did secure substantial information under oath to justify the following recommendations, and based upon the information secured, the subcommittee recommends as follows.

"(1) The Board should restore forthwith Long Beach Federal to its former management.

"(2) Upon restoration of Long Beach Federal to its former management, the Board should then determine which of its charges still have merit, should state them in a clear and definite manner, and should utilize the procedures prescribed in section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, to duly notify the association and to request corrective action.

"(3) As a general policy, the Board should give effect to section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, by formally specifying charges when violations of law or regulations are alleged, duly notifying the associations concerned, and giving them opportunity, as prescribed by law, to take corrective action.

"(4) In effecting the return of Long Beach Federal to its former management, the Board should utilize the financial and credit resources of the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank of San Francisco to enable the association to repair the damage done by the seizure and to regain its previous business position.

"(5) If and when any Federal association's shareholders, by the means prescribed in the law, record their wish to convert from a Federal to a State association, the Board should refrain from interfering and putting obstacles in the way of this conversion.

"(6) The Board should make a concerted and wholehearted effort to bring to a close long-standing legal controversies with Long Beach Federal by settlement or compromise of the litigation or by withdrawal of interferences to a speedy resolution of the litigation.

"(7) The Board, in exercising its supervisory authority, should refrain from using this authority to circumvent or interfere with litigation properly brought to the courts by savings and loan associations.

"(8) Pending revision of the applicable legislation, the Board should by regulation establish uniform criteria for determining what constitutes unsafe or unsound practices of association management."

There were claims for damages by the Association against the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, and the individual members of the Board and other officers of the Board. These were not ephemeral and trivial as indicated by the fact that in the Settlement Agreement the Federal Home Loan Bank Board and Insurance Corporation in effect agreed to, and did, pay \$5,000,000 as damages by way of discharging interest obligations of Long Beach Association in that amount. The handling of the Association by the agencies of the Federal Home Loan Bank Board caused litigation and trouble from others. Just as one illustration, there was a large loan of about \$20,000,000 when a subdivision was being developed with a golf course and other facilities, all of the money for which was handled through the Long Beach Association. When the supervising agent in charge for the Federal Home Loan Bank Board came in in April 1960 he stopped all advance payment of money, and (apparently either he or those in Washington were not familiar with the mechanics lien laws of California) he testified from the stand that he was instructed not to record the \$20,000,000 trust deed, and it was not done until the court ordered it to be done about 60 days later in the course of one of the hearings, so that the trust deed note of the seized Association would be ahead of any mechanics liens for labor and material. Simple prudence in the management of the seized Association would have required the immediate recordation of that trust deed upon seizure and stoppage of the flow of construction money.

The Settlement Agreement itself is a long, complicated, in-
ed document, and provided for the dismissal of the then pending
gation, the return of the Association to its elected management,
discharge of \$5,000,000 in interest heretofore mentioned; and
approved the proposed merger between Equitable and Long Beach,
distribution of the Long Beach surplus pro-rata among its
shareholder-depositors which, as hereinbefore indicated by the un-
radicted testimony before this court, the Government defendants
ged on after the return of the Association. As hereinbefore
ed, there followed another congressional investigation, and
lly a merger agreement resulted with heretofore-mentioned re-
ctive conditions in it which were contrary to the Settlement
ement and which the Association contended, and which were
rary to law and which resulted in the three suits upon which
ment was entered by this court in May 1965 and are now on appeal.
There can be no doubt that it was the result of the litigation
enced by Attorney Chapman and his continued and persistent and
rceful efforts, and by the Shareholders Protective Committee,
the Association was finally returned, and thus the Long Beach
ciation and Equitable were able to complete the merger on
ember 10, 1963, negotiations for which had begun in 1958, which
ted in the 791,650 shares of Equitable stock for distribution
ong Beach depositors.

In the Settlement Agreement, the Association and the Share-
ers' Protective Committee, the Federal Home Loan Bank Board and

the Federal Savings and Loan Insurance Corporation agree that the Government agencies will not object to attorneys' fees "for past unpaid-for services to the date of the Agreement (February 14, 192) arising out of the prior conservatorship in 1946-1948 in an amount not exceeding \$500,000." (Article XIII, c.) The Government contends that that, together with a provision in the Proxy Statement limits any fee to Mr. Chapman to that sum.^{9/} I do not so read either and, taken both together, a contrary conclusion is required.

It is to be noted in the Settlement Agreement (p. 39) that it only relates to "past unpaid-for services to the date of this agreement arising out of the prior conservatorship in 1946-1948 in an amount not exceeding \$500,000." It says nothing about limitations on the fees to prevent the attempted seizure in 1959; it says nothing about the services after or during the 1960 seizure. It says nothing

9/ "(3) The Association, in arranging for ultimate discharge of the balance of its liability to Attorney Charles K. Chapman for his services in connection with the 1946-1960 seizures litigation, made \$504,000 loans to said attorney secured by shares of the Association issued to U.S. National Bank of San Diego as trustee under Installment Charity Trust. Said share loans and Association's liability for said attorney's fees in said litigation are to be concurrently cancelled in installments over a 15 year or longer period. The Association has established a specific reserve out of undivided profits (per Settlement Statement) for its full liability in connection herewith; and, as its obligations for payment of such fees are discharged, the specific reserves therefor will be restored to Undivided Profits and legal expense will be charged."

Quoted from Proxy Statement re merger.

out the services in connection with either the negotiation of the Settlement Agreement or the merger or the three instant suits plainly contemplated by the merger agreement, or numerous other services. The portion of the Proxy Statement quoted in footnote 9 plainly indicates the loan does not contemplate the "ultimate discharge" of liability for Chapman's services by it. The merger agreement must be read with the Settlement Agreement, as is indicated not only by the two agreements but by the Proxy Statement [Exhibit E, pp. 16, 18, 21, 23, 44, 45 and p. 51].

The Government contends that the \$504,000 mentioned in the Proxy Statement and quoted in footnote 9 is actually a payment of \$504,000 to Attorney Chapman. These are loans, not payments. Attorney Chapman still owes \$504,000, and by his undisputed statement has already paid some \$35,000 in interest to the Long Beach Savings for the use of the money. The advantage to Attorney Chapman in virtue of that loan comes only because he pays a low interest rate of 1-1/4% and is able to reinvest the money at a higher interest rate, and because the loans are for a period of 20 years or until after his death. While his creditor, that is, the owner of the notes, changes, on conditions, from the Long Beach Association to philanthropic associations, Chapman still owes the \$504,000, and will have to pay interest until he, or his estate, repays to someone the whole \$504,000.

The loan does have a present value as of the date of the merger, which, according to standard practices, can be appraised. At the

court's suggestion the petitioners secured an expert who gave an appraisal of the present value on that loan in November 1962 of \$109,527, and the court finds that that was the value to Attorney Chapman of that loan on that date.

To try and segregate the services here rendered by the petitioners in connection with the different facets of the many proceedings and things done by Mr. Chapman would be like trying to pinpoint each color in a thousand foot wall painted with a paint which had been blended out of every color of the rainbow.

The one thing which is outstanding in connection with attorney fees is that almost everything which has happened in all the litigation and hearings was interlinked somewhat and somehow with every other thing that was done or attempted. For instance, there could have been no merger, and hence no surplus permitting the 791,650 shares to be distributed to the shareholders of Long Beach Federal Savings and Loan Association, if the Association had not been released from the first seizure, and from the second seizure; and in an overall appraisal of the series of events involved, the merger, which was the heart of the Settlement Agreement, was the final act which not only produced the value to the surplus but took the Association from under what it considered to be the harassment of the Federal Home Loan Bank Board.

While it is true that in the Settlement Agreement a \$5,000,000 advantage was obtained by way of what Mr. Chapman calls damages to the Long Beach Association, and while it is true that \$3,000,000

d for the goodwill of Long Beach Association by Equitable, and
le it is true that a tax advantage accrued in the sum of probably
eral million dollars by virtue of the manner of handling the whole
nsaction, and while it is true that the \$3,000,000 contemplated
be put in escrow for ten years under the Settlement Agreement
the Long Beach Association was released for immediate use by
itable, and while it is true that the merger resulted in a more
n \$150,000,000 institution, nevertheless all of these things
minated in one tangible benefit to the depositor-shareholders
Long Beach, namely, the right to a pro-rata share of 791,650
res of Equitable stock received as a bonus or surplus from
itable in addition to having Equitable assume the full and
plete responsibilities for all of their deposits as they stood
the time of merger, and also assuming all liabilities of Long
ch. The last-mentioned are intangibles and have great value to
g Beach, but I see no way of placing a dollar value on them.

One intangible was getting the Board, through the Insurance
poration, to take over the entire 20 million dollar Bellehurst
n, which is still in litigation.

No matter how the appellate court decides the appeals in these
ee cases, 791,650 share of Equitable stock still must go to the
reholder-depositors of Long Beach. While they may go in pro-
tions which are contrary to law, nevertheless they do go to them
a benefit.

The Government complains that the papers filed by Mr. Chapman in connection with the various litigation were prolix and unnecessary. I concede, as the judge who has had to examine and read every one of them, that some of them are a little long, but I cannot say that they were unnecessary. It is an old axiom, which some lawyers learn only from bitter experience, that it is much better to have an essential allegation in a document than to have it out.

In considering the nature of the opposition, I can draw on my own experience of 50 years at the bar with 25 years on the bench and say that I have never seen a lawsuit where the plaintiffs encountered a more stubborn and determined opposition than the Lehigh Beach and the Shareholders' Protective Committee have incurred to date from the Federal Home Loan Bank Board. Every conceivable administrative and legal obstacle has been invoked. It is only with what I must say has been remarkable ingenuity, experience and perseverance on the part of the petitioning attorneys in this case that any results have been achieved at all, and they have done so knowing the payment of any fees was contingent on success.

One of the elements emphasized in the reported decisions is the contingent nature of the fee. The testimony is uncontradicted that as far as the services of the petitioners are concerned, they agreed from the beginning that their fees would be of a contingent nature and would ultimately be set by the court. Certainly, if they had never recovered the Association and the merger with Equitable had never been effected, there would have been no occasion for any fee.

and to indicate the risk they took, the evidence is uncontradicted concerning the overhead borne and paid out by Mr. Chapman and by Mr. Trammell. The total overhead by Mr. Chapman for the years 1958 to the end of 1964 is \$627,929.35, to which he attributes--without any contrary testimony, I again must emphasize--that \$302,575.83 is the share of the overhead attributable to the merger, without regard to the seizure and other litigation.

Mr. Trammell's total overhead from the year 1960 when he came into the case to 1964 is \$101,610.35 to which he attributes \$23,776.90 to the services in connection with the merger. Thus there is over \$325,000 in overhead which the petitioners here had paid out in order to accomplish the merger only, which is only part of the services rendered and results obtained in this case.

The two experts who testified, Mr. Simpson and Mr. Belcher, are men of outstanding ability and a long period of practice in intricate and involved litigation. The testimony was that the fees to be paid to the petitioners should be between 25% and 33% of the benefit accrued. As heretofore indicated, the benefit accrued was the 791,650 shares of stock.

The only possible way to fix a fair fee in this series of extraordinary disputes and litigation is to take into consideration the ultimate benefit achieved, viz., 791,650 shares of Equitable stock; fix a year by year value for the services rendered, and subtract the amounts previously received on account.

To state this in terms of dollars, it is first necessary to fix the per share value of Equitable stock. The book value, in my judgment, is nearest the measure of true value for the purpose of this determination as opposed to market value either at the date of the merger or the date of the hearing. The undisputed testimony is that the book value on the date of the hearing was approximately \$8 per share. Upon that testimony and after examination of the December 31, 1964 Financial Statement of Equitable [Exhibit 16], I find \$8 per share to be the value of each share of the 791,650 shares of stock, for the purposes of determining fair and reasonable fees to petitioner.

In early 1949 I allowed Attorney Chapman \$270,000 fees on account for his services from May 1946 to the end of 1948, but, upon representation of the Assistant to the Attorney General that the litigation would be forthwith settled, a stipulation was made that the payment of two-thirds thereof was stayed and only \$90,000 was paid to him.

Within less than a week that stipulation was repudiated by the then Attorney General without consultation with the judge who had approved the stipulation upon representation that the then Attorney General personally approved it. At that time the allowance was on account, and the said stipulation included terms that the Association would be returned, the cases would be settled and that the court would determine the total fees to which Attorney Chapman would be entitled.

That the value of Mr. Chapman's services in connection with the 1946 seizure was far in excess of \$270,000 is indicated by the herebefore-mentioned provision in the Settlement Agreement approved by the Bank Board which, in effect, conceded his services in connection with that seizure were worth at least \$500,000 in addition to the \$270,000 paid him on account. Those services, however, continued after 1948, not only in attempting to get an accounting from the conservator but in State court lawsuits^{10/} resulting from acts taken by the conservator.

In viewing the whole kaleidoscope of the numerous controversies and innumerable problems, which were continuous, and the results achieved, the sum of \$90,000 per year for each of the 19 years from 1946 to December 1964, inclusive, for Mr. Chapman's services is reasonable and fair, and I so find.

I therefore conclude that the reasonable value of Mr. Chapman's services are fixed and allowed as follows: \$90,000 for each of the years 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, and 1964. From these sums there is to be subtracted the sum of \$90,000 paid Attorney Chapman on account in 1949, the sum of \$160,000 paid on account in 1962, the sum of \$109,527 on account (the present value of the \$504,000 loan as of November 15, 1962), and \$65,000 paid him on account as mentioned

Divorces, condemnation, quiet title, income tax, fraud and almost other kinds of litigation.

in Exhibit 12, lines 5 to 8, which totals a deduction in round numbers of \$22,000 separately for each year of the 19 years. That leaves the net sum of \$68,000 which I fix and allow as the reasonable unpaid value of his services, separately, for each of the years 1946 to 1964, inclusive, to be paid Attorney Chapman.

It is to be distinctly understood that nothing herein said is to be considered or construed as allowing a lump sum fee in any amount, but each year's work is to be compensated as a separately allowed fee for each year to Attorney Chapman only as above stated.

Coming now to the attorney for the Shareholders' Protective Committee. Counsel requested that one fee could be allowed and divided by agreement between them. But it has not been treated that way by the parties, the lawyers, or the Bank Board. And I do not think it should be treated that way now. The great bulk of the work has been done by Chapman, and he has carried the expense, even to paying out of his pocket a fee of \$50,000 to a lawyer for assisting him in one phase.

By the Settlement Agreement, Article XIII, the Bank Board agreed to interpose no objection to:

"b. Attorneys' fees for services rendered to date by attorneys for the Shareholders' protective Committee and trustees under deeds of trust in connection with litigation arising out of said prior conservatorship, in an aggregate amount not exceeding \$100,000; and attorney fees and costs paid in settlement

of the San Francisco Bank litigation"; (Underscoring supplied)

This sum has been paid, and Mr. Trammell, who became attorney for the Shareholders' Protective Committee in 1960, acknowledges payment for all his services, except in connection with the merger. His services have been continuous in that respect since 1960. He has five years of services on the merger uncompensated, for which the sum of \$10,000, separately, for 1960, 1961, 1962, 1963 and 1964 is reasonable and is fixed and allowed, not as a lump sum but for each year separately.

The allowances made herein are well within the range of reasonability testified to by the experts.

The question now arises as to whether or not any of this sum should be assessed against the defendants. I do not think any of it should be assessed against the California State Building and Loan Commissioner, and indeed I do not think it should be, because he has only been more or less a formal defendant. I do not believe that any of it can be assessed against the Federal Home Loan Bank Board because, howsoever grossly wrong their actions may have been, the acts which the Board did in this case were governmental actions and it was not acting in a proprietary capacity. However, the Federal Savings and Loan Insurance Corporation is a sue and be sued corporation; it is not engaged in a governmental capacity; it is engaged in a proprietary business, and collects premiums paid by policyholders. It is run by the same people who run the Bank Board

although they wear a different hat. But in looking at the Settlement Agreement as a whole, it is the opinion and judgment of the court that the \$5,000,000 advantage secured by Long Beach by the Settlement Agreement comprehended whatever liability the Federal Savings and Loan Insurance Corporation had for attorneys' fees.

In discharging the judgment, the 71,183 shares of stock remaining in court, after compliance with the prior judgments of the court, may be used in whatever manner is agreeable to petitioners and Equitable to be expressed by stipulation, subject to approval of the court.

I am of the present opinion that this Memorandum contains the findings of fact and conclusions of law which are necessary under Federal Rules of Civil Procedure 52(a), but petitioners may within five days, suggest that they desire additional findings and conclusions to be submitted later, if they deem them necessary and proper. If not, this will also serve as the formal order of allowance.

Dated at Los Angeles, California, this 25th day of July, 1961

s/ Pierson M. Hall
PIERSON M. HALL
UNITED STATES DISTRICT JUDGE

Nos. 20378, 20447 and 20522

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20378

FEDERAL HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

SIDNEY ELLIOTT, *et al.*,

Appellees.

No. 20447

FEDERAL HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

SIDNEY ELLIOTT, *et al.*,

Appellees.

No. 20522

FEDERAL HOME LOAN BANK BOARD, *et al.*,

Appellants,

vs.

EQUITABLE SAVINGS AND LOAN ASSOCIATION, *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California.

(Now Central District of California)

Brief for Appellee Equitable Savings & Loan Association.

LOUIS BLAU,
PAUL GUTMAN,
STANLEY BELKIN,

9777 Wilshire Boulevard,
Suite 918,
Beverly Hills, Calif. 90212,

*Attorneys for Appellee, Equitable
Savings and Loan.*

FILED

DEC 2 1966

WM. B. LUCK, CLERK



TOPICAL INDEX

	Page
Preliminary Statement	1
Argument	2
The Merger Should Not Be Set Aside	2
Conclusion	3

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20378

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Appellants,
vs.
SIDNEY ELLIOTT, *et al.*,
Appellees.

No. 20447

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Appellants,
vs.
SIDNEY ELLIOTT, *et al.*,
Appellees.

No. 20522

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Appellants,
vs.
EQUITABLE SAVINGS AND LOAN ASSOCIATION, *et al.*,
Appellees.

On Appeal From the United States District Court for the
Southern District of California.

**Brief for Appellee Equitable Savings &
Loan Association.**

Preliminary Statement.

Appellee Equitable Savings and Loan Association (Equitable) having interpleaded the shares in dispute, takes no position on whether said shares should be distributed pro rata as ordered by the District Court, or

in accordance with the restrictive provisions of the Merger Agreement as contended by Appellants.

Equitable urges that *either* the judgments appealed from be affirmed *or* that the shares be ordered distributed in accordance with the Merger Agreement, *but that in no event should the merger be ordered set aside.*

ARGUMENT.

The Merger Should Not Be Set Aside.

Appellants urge that if it is determined that the restrictive provisions of the Merger Agreement, which they insisted upon, are invalid, the Court may not order that the stock be distributed pro rata, but must, instead, order that the merger be set aside and that Equitable be divested of the Long Beach assets and liabilities.

It is submitted that it is impossible to now divest Equitable of the Long Beach assets and liabilities and that were such unscrambling possible, it would be improper to order the same in the circumstances of this case.

The clock cannot be turned back more than three years. The present Equitable assets and liabilities cannot be divided into a Long Beach bundle and an Equitable bundle. The inequities which would result from such a division makes the same unthinkable.

If it were possible to set the merger aside, it would not be proper to do so by reason of the non-appealable Consent Order requiring distribution of the stock not in dispute [3 R. 167-179, 180-190, 309-311].

By stipulating to the distributions of the shares not in dispute, Appellants consented to a Court determination of the ownership of shares in dispute and waived any rights they might otherwise have had to require the merger to be set aside.

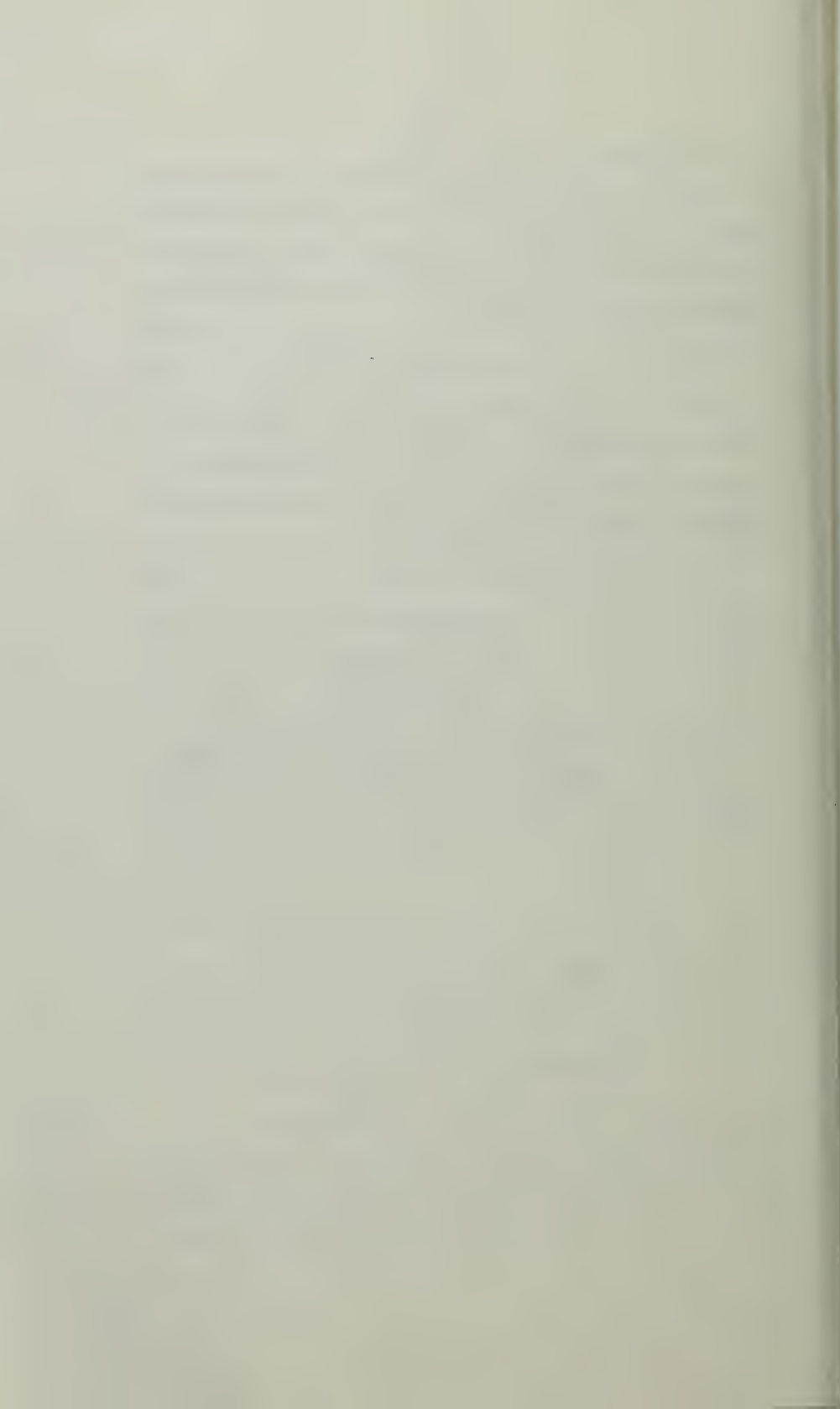
Conclusion.

Either the Judgments appealed from should be affirmed, or the shares should be ordered distributed in accordance with the Merger Agreement, but in no event should the merger be ordered set aside.

Respectfully submitted,

LOUIS BLAU,
PAUL GUTMAN,
STANLEY BELKIN,

By STANLEY BELKIN,
*Attorneys for Appellee, Equitable Savings
and Loan Association.*



Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

STANLEY BELKIN



FEB 10 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD, ET AL.,

Appellants.

-v-

EDNEY ELLIOTT, ET AL., AS THE SHAREHOLDERS'
PROTECTIVE COMMITTEE OF LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION AND LONG BEACH
FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLEES LONG BEACH FEDERAL
SAVINGS AND LOAN ASSOCIATION AND ELLIOTT, ET AL.,
AS THE SHAREHOLDERS' PROTECTIVE COMMITTEE OF SAID
ASSOCIATION

CHARLES K. CHAPMAN
Attorney at Law
Fifth Floor, Ocean Center Bldg.
Long Beach, California 90802

Attorney for Appellee Long
Beach Federal Savings and
Loan Association.

GEORGE W. TRAMMELL
Attorney at Law
60 Elm Avenue
Long Beach, California 90812

Attorney for Shareholders'
Protective Committee.

FILED

JAN 10 1967

TOPICAL INDEX

	<u>Page</u>
INTRODUCTION-----	1
STATEMENT-----	5
QUESTIONS-----	34
SUMMARY OF ARGUMENT-----	35
ARGUMENT-----	39
I. APPELLANTS' ILLEGAL AND ARBITRARY FOR- FEITURES AND PENALTIES AGAINST THOUSANDS OF SMALL MUTUAL SAVINGS DEPOSITORS VIOLATE ACTS OF CONGRESS-----	39
II. FEDERAL SAVINGS AND LOAN ASSOCIATIONS ARE REQUIRED BY CONGRESS TO BE "MUTUAL" ASSOCIATIONS-----	45
III. ANY UNEQUAL DISTRIBUTION AMONG MUTUAL SAVINGS DEPOSITORS PREFERRING ONE AND EXCLUDING OTHERS, VIOLATES THE ACT OF CONGRESS AND IS VOID-----	55
IV. ANY PREFERENCE OF ONE CLASS OF SAVINGS DEPOSITORS (SHAREHOLDERS) OVER ANOTHER MUST BE PLAINLY STATED IN THE PASSEBOOKS GIVEN TO THE SHAREHOLDERS-----	58
V. APPELLANTS SWORE TO CONGRESS THAT ALL SAVINGS DEPOSITORS BIG AND SMALL, OLD AND NEW ARE TREATED ALIKE-----	61
VI. PLEDGING A SAVINGS ACCOUNT TO SECURE A LOAN IS NO CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO FORFEIT ANY PART OF THE PLEDGED SAVINGS ACCOUNT-----	72
VI-A. APPELLANTS MADE NO FINDINGS OF ANY FRAUD, CRIME, OR WRONGDOING BY ANYONE-----	77
VII. HAVING MORE THAN \$10,000 IN A SINGLE SAVINGS ACCOUNT IS NO CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO FORFEIT ANY PART OF SAID ACCOUNT-----	84

VIII.	APPELLANT BANK BOARD FORFEITS SMALL DEPOSITORS INSTEAD OF PROTECTING THEM-----	87
IX.	WHATEVER MAY BE THE POWER OF THE BOARD BASED UPON FINDINGS OF FACT IT CANNOT FORFEIT PLAINTIFF'S SAVINGS DEPOSITS BY MERE EDICT OR FIAT ISSUED AFTER THE DEPOSITS WERE MADE-----	97
X.	BY THE TERMS OF APPELLEE LONG BEACH FEDERAL'S CHARTER IT COULD NOT BE AMENDED WITHOUT THE ASSOCIATION'S CONSENT-----	106
XI.	THE TRIAL COURTS 1,899 JUDGMENTS ARE JUST AND EQUITABLE. THEY SHOULD BE AFFIRMED REGARDLESS OF WHETHER THIS COURT OF APPEALS APPROVES ALL THE TRIAL COURTS REASONS FOR ENTERING SUCH JUDGMENTS-----	110
XII.	\$4,606,250,000 OF NEW SAVINGS DEPOSITS WERE MADE IN 108 LOS ANGELES - LONG BEACH SAVINGS ASSOCIATIONS IN 1962. NONE WERE PENALIZED EXCEPT LONG BEACH FEDERAL-----	126
XIII.	APPELLEE SHAREHOLDERS' PROTECTIVE COMMITTEE PROPERLY REPRESENT ALL 60,000 LONG BEACH FEDERAL SAVINGS DEPOSITORS. THEY REFUSE TO ACCEPT ANY FORFEITED STOCK: NONE HAVE JOINED WITH APPELLANTS-----	129
XIV.	THERE IS NO LACHES OR ESTOPPEL BY APPELLEES LONG BEACH FEDERAL OR ITS SHAREHOLDERS' PROTECTIVE COMMITTEE-----	146
XV.	APPELLANTS RELY ON OHIO AND OTHER CASES RE STABLE AND SAFE SAVINGS ASSOCIATIONS. SUCH CASES CAN HAVE NO APPLICATION TO THE WRECKED AND DAMAGED APPELLEE LONG BEACH FEDERAL AND ITS PRECARIOUS CONDITION AFTER 20 YEARS OF SEIZURES, LITIGATION AND RUNS-----	148

XVI.	THE DISTRICT COURT HAS JURISDICTION OVER THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER TO PREVENT HIM FROM VIOLATING THE U. S. CONSTITUTION, FEDERAL STATUTES AND APPELLEE'S FEDERAL RIGHTS IN THEIR FEDERAL SAVINGS AND LOAN ASSOCIATION-----	153
	A. Suing The California Savings And Loan Commissioner Does Not Make The State Of California A Defendant-----	153
	B. The State Of California Has Consented To Suit Against The California Savings And Loan Commissioner-----	161
	C. The United States Court Which Holds Physical Possession Of \$9,500,000 Of Equitable Guarantee Stock Decides All Questions Concerning That Stock-----	171
	D. It Is Not Necessary To Name The California Savings And Loan Commissioner As A Personal Defendant-----	175
	E. The Commissioner's Authorities Apply Only To Actions To Recover Money Or Property From The State And Do Not Apply To Our Three Cases-----	176
	F. Appellant California Savings And Loan Commissioner Makes Claims On Appeal Contrary To His Answers To The Trial Court-----	177
XVII.	SUMMARY JUDGMENT WAS A PROPER METHOD FOR THE TRIAL COURT TO DECIDE THE CASE-----	182
	CONCLUSION-----	188

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>Page</u>
<u>Anglo-Canadian Shipping Co. Ltd. v.</u> <u>Federal Maritime Com'n., 310 F. 2d 606 (1962)</u> -----	101
<u>Boyd v. United States, 116 U.S. 616, 29 L.ed.</u> <u>746 (1886)</u> -----	116
<u>California Motor Transport Co. v.</u> <u>Public Utilities Com., 59 C. 2d 270 (1963)</u> -----	104
<u>California State Board of Equalization v.</u> <u>Goggin, 191 F. 2d 726 (CA-9, 1951) [Cert.</u> <u>Denied 342 U. S. 909, 96 L. ed. 680]</u> -----	174
<u>California State Board of Equal. v.</u> <u>Coast Radio Prod.,</u> ----- <u>228 F. 2d 520 (CA-9, 1955)</u>	174
<u>Castner v. First National Bank of Anchorage,</u> <u>278 F. 2d 376 (CA-9, 1960)</u> -----	113
<u>Chambers v. United States, 357, F. 2d 244</u> <u>(CA-8, 1966)</u> -----	186
<u>C. I. R. v. Wilshire Holding Corporation,</u> <u>288 F. 2d 799, (CA-9, 1961)</u> -----	33
<u>Coffey v. Jordan, 275 F. 2d 1 (U.S.C.A. -</u> <u>Dist. of Columbia, 1959)</u> -----	104
<u>Commissioner of Internal Revenue v. Van Vorst,</u> <u>59 F. 2d 677 (CA-9, 1932)</u> -----	39, 40, 41
<u>Denicke. et al., v. Anglo-California Nat'l.</u> <u>Bank of San Francisco, 141 F. 2d 285 (CA-9, 1944)</u> <u>[Cert. Denied 323 U. S. 739, 89 L. ed. 592]</u> -----	138
<u>Denicke v. Anglo California Nat. Bank, 45 Fed.</u> <u>Supp. 524 (1942) [Cert. Den. 323 U.S. 739, 89</u> <u>L. ed. 592]</u> -----	139
<u>Dixon v. United States, 381 U. S. 68, 14 L. ed.</u> <u>2d 223 (1965)</u> -----	41
<u>Elliott v. Federal Home Loan Bank Board,</u> <u>233 F. Supp. 578 (1964)</u> -----	2, 5, 11, 16, 17, 19, 22, 24, 25, 41, 42, 57, 63, 67, 78, 85, 89, 112, 115, 123, 142, 143, 153, 188,

<u>Ex Parte Tyler</u> , 149 U. S. 164, 37 L. ed. 689 (1893)-----	173
<u>Ex Parte Young</u> , 209 U. S. 123, 52 L. ed. 714 (1908)-----	160, 175
<u>Farmers v. United Electrical, etc.</u> , 211 F. 2d 36 (CA-DC, 1953) [Cert. Denied 347 U. S. 943, 98 L. ed. 1091]-----	71
<u>Federal Home Loan Bank Board v. Greater Delaware Valley S. & L. Ass'n.</u> , 277 F. 2d 437 (CA-3, 1960)-----	18, 23, 24, 132, 140, 141
<u>Federal Home Loan Bank Board v. Long Beach Federal Sav. & Loan Assn.</u> , 295 F. 2d 403, (CA-9, 1961)-----	27, 44, 63
<u>Federal Maritime Com'n. v. Anglo-Canadian Shipping Co.</u> , 335 F. 2d 255, (CA-9, 1964)-----	39
<u>First National Bank in Billings v. First Bank Stock Corp.</u> , 306 F. 2d (CA-9, 1962)-----	183
<u>Freeman v. Bee Machine Co.</u> , 319 U. S. 448, 87 L. ed. 1509, (U. S. Supreme Court, 1942)-----	165
<u>Griffin v. School Bd. of Prince Edward</u> , 377 U. S. 218, 12 L. ed. 256 (1964)-----	155
<u>Harris v. Palm Springs Alpine Estates, Inc.</u> , 329 F. 2d 909 (CA-9, 1964)-----	131, 142
<u>Hawke v. Commissioner of Internal Revenue</u> , 109 F. 2d 946 (CA-9, 1940)-----	39, 40
<u>Helvering v. Sabine Transp. Co.</u> , 318 U. S. 306, 87 L. ed. 773, (1943)-----	41, 42
<u>Hoston v. J. R. Watkins Company</u> , 300 F. 2d 869 (CA-9, 1962)-----	186
<u>Huntington v. Nat. Savings Bank</u> , 96 U. S. 388, 24 L. ed. 777 (1878)-----	49
<u>In Re Cleveland Savings Society</u> , 25 Ohio Op. 2d 402, 192 N. E. 2d 518 (C.P. Cuyahoga County, 1961)-----	148

<u>In Re Springfield Savings Society,</u> Case No. 60513, Court of Common Pleas of Clark County, Ohio (1965)-----	148
<u>In re Woodmar Realty Company,</u> 294 F. 2d 785 (CA-7, 1961), [Cert. Denied 369 U. S. 803, 7 L. ed. 2d 550]-----	11
<u>Intermountain Building & Loan Ass'n. v.</u> <u>Gallegos,</u> 78 F. 2d 972 (CA-9, 1935) [Cert. Denied 80 L. ed. 454, 296 U. S. 639]-----	51
<u>Interstate Commerce Com. v.</u> <u>Louisville & N.R.Co.,</u> 227 U. S. 88, 57 L. ed. 431 (1913)-----	105
<u>Johnson v. Lankford,</u> 245 U. S. 541, 62 L. ed. 460 (1918)-----	154
<u>Joint Anti-Fascist Refugee Com. v. McGrath,</u> 341 U. S. 123, 95 L. ed. 817 (1951)-----	189
<u>Kanatser v. Chrysler Corp.,</u> 199 F. 2d 610 (CA-10, 1952) [Cert. Denied 344 U. S. 921, 97 L. ed. 710]-----	114
<u>Kirk v. United States,</u> 270 F. 2d 110 (CA-9, 1959)-----	39,40
<u>Land v. Dollar,</u> 330 U. S. 731, 91 L. ed. 1209 (1947)--	160,175
<u>Long Beach Federal v. Federal Home Loan Bank Board,</u> 189 F. Supp. 589 (1961)-----	12,23,26,27,68,94
<u>Madisonville Traction Co. v. St. Bernard Min. Co.,</u> 196 U. S. 239, 49 L. ed. 462 (U. S. Supreme Court, 1905)-----	164
<u>Mallonee v. Fahey,</u> 14 F.R.D. 273 (1949)-----	12,21,22, 23,24,93,94
<u>McNeill v. Southern R. Co.,</u> 202 U. S. 543, 50 L. ed. 1142 (1905)-----	156
<u>Ochoa v. Hernandez Y Morales,</u> 230 U. S. 139, 57 L. ed. 1427 (1913)-----	190
<u>Pacific Coast Sav. Soc. v. Sturdevant,</u> 165 Cal. 687, (1913)-----	53

	<u>Page</u>
<u>Pan American Petroleum & Transp. Co. v.</u> <u>United States, 273 U. S. 456, 71 L. ed. 734 (1927)</u> -----	11
<u>Paramount Pest Control Service v.</u> <u>United States, 304 F. 2d 115 (CA-9, 1962)</u> -----	186
<u>Parden v. Terminal R. of Alabama Docks Dept.,</u> <u>377 U. S. 184, 12 L. ed. 2d 233 (1964)</u> -----	167
<u>Porter v. Aetna Cas. & S. Co., 370 U. S. 159,</u> <u>8 L. ed. 2d 407 (1962)</u> -----	47
<u>Reagan v. Farmers Loan & Trust Co., 154 U. S. 362,</u> <u>38 L. ed. 1014 (1894)</u> -----	157, 161, 169
<u>Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert.</u> <u>Denied 380 U. S. 915; 13 L. ed. 2d 800]</u> -----	18, 23, 132
<u>Reynolds v. United States, 286 F. 2d 433</u> <u>(CA-9, 1960)</u> -----	39, 40
<u>J. E. Riley Invest. Co. v. Commissioner of</u> <u>Int. Rev., 311 U. S. 55, 85 L. ed. 36 (U. S.</u> <u>Supreme Court, 1940)</u> -----	114
<u>Securities and Exchange Com. v. Chenery Corp.,</u> <u>87 L. ed. 626, 318 U. S. 80 (U. S. Supreme</u> <u>Court, 1942)</u> -----	99, 105
<u>Securities and Exchange Com. v. Chenery Corp.,</u> <u>91 L. ed. 1995, 332 U. S. 194 (1947)</u> -----	100
<u>Service v. Dulles, 354 U. S. 363, 1 L. ed. 1403,</u> <u>(1957)</u> -----	59
<u>Society for Sav. vs. Bowers, and companion case of</u> <u>First Federal Savings and Loan Association of Warren vs.</u> <u>Bowers 99 L. ed. 950, 349 U. S. 143 (1954)</u> -----	46
<u>State of New York v. United States of America,</u> <u>96 L. ed. 662, 342 U. S. 832 (U. S. Supreme</u> <u>Court, 1951)</u> -----	103
<u>Sterling v. Constantin, 287 U. S. 378, 77 L. ed.</u> <u>375 (1932)</u> -----	158
<u>Texas & P. R. Co. v. Humble, 181 U. S. 57,</u> <u>45 L. ed. 747, (U. S. Supreme Court, 1901)</u> -----	164

<u>The Trustees of Dartmouth College v.</u> <u>Woodward</u> , 17 U. S. 518, 4 L. ed. 629 (1819)-----	106
<u>United States v. Philadelphia Nat. Bank</u> , 374 U. S. 321, 10 L. ed. 2d 915 (1963)-----	124
<u>United States v. Shaughnessy</u> , 347 U. S. 260, 98 L. ed. 681 (U. S. Supreme Court, 1953)-----	60
<u>U. S. v. Mt. Vernon Milling Co.</u> , 345 F. 2d 404 (CA-7, 1965)-----	184
<u>Wilson v. Loew's Inc.</u> , 142 C. A. 2d 183 (1956) [Cert. Den. 355 U. S. 597, 2 L. ed. 2d 519]-----	11
<u>Wisconsin Bankers Association v. Robertson</u> , 190 Fed. Supp. 90 (DC-D.C., 1960); 294 Fed. 2d 714 (CA-D.C. 1961); [Cert. denied 7 L. ed 2d 338; 368 U. S. 938]-----	48
<u>Wood v. Hamaguchi</u> , 207 Cal. 79 (1929)-----	53
<u>Yick Wo v. Hopkins</u> , 118 U. S. 356, 30 L. ed. 220 (1886)-----	189

<u>Regulations</u>	<u>Page</u>
Title 12, Code of Federal Regulations §545.7-----	73
Title 12, " " " " §545.2-----	73
Title 12, " " " " §546.4-----	55
Title 12, " " " " §561.5-----	74
Title 12, " " " " §563.3-----	53, 59

<u>Rules</u>	
Federal Rules of Civil Procedure, Rule 9(b)-----	120
" " " " " Rule 25-----	175
" " " " " Rule 56(c)-----	185, 187

<u>Statutes</u>	
California Financial Code §5258-----	161, 162, 168 169
" " " §7404-----	168
" " " §9003-----	168
" " " §9203-----	162, 166
" " " §9205-----	162, 166
" " " §11000-----	165, 166
The Eleventh Amendment to the U. S. Constitution----	167, 177
The Fourteenth Amendment to the U. S. Constitution---	167

	<u>Page</u>
Title 12, United States Code §1437-----	5
Title 12, " " " §1461-2-----	5
Title 12, " " " §1464(a-1)-----	1,5
Title 12, " " " §1464(a)-----	45,50,55,56,83
Title 12, " " " §1464(d)-----	1,93,163
Title 12, " " " §1464(i)-----	3,5,17,18,23, 42,63,85,89,90, 92,98,140
Title 12, " " " §1724-----	80,81
Title 12, " " " §1725-----	5
Title 12, " " " §1725(c)-----	1
Title 26, " " " §593-----	15,32
Title 26, " " " §692-----	16
Title 28, " " " §1441-1442-----	163
Title 28, " " " §2361-----	175

Reference Materials

"The Federal Savings and Loan System" Chapter 7, pages 61-63-----	107
"Davis On Administrative Law," Volume 2, paragraph 16.05 pg. 447-----	104
"The 1965 Savings and Loan Fact Book"-----	124
Congressional Investigations----- (Appendix III hereof)	18,19,21,25,27, 34,42,43,61,62, 63,64,69,70, 92,93

INTRODUCTION

All appellants jurisdictional statements and statements of the case are so slanted and misleading that appellees are required to make this statement of what was really decided by the Trial Court and is involved on these appeals.

These appeals involve the treatment to be accorded \$42,000,000 of new savings deposits which in 1962 saved the wrecked and almost destroyed appellee Long Beach Federal. ^{1/}

1/ Appellee Long Beach Federal Savings and Loan Association is hereafter "Long Beach Federal" or "Association". It is a mutual savings and loan association. (12 U.S.C. 1464(a-1)). It is the focal point of 20 years of continuous litigation, seizures and threatened seizures, Congressional Investigations and controversies, repeatedly before the U. S. Supreme Court, this Court of Appeals, the Trial Court, and the California State Trial and Appellate Courts.

Appellee Shareholders' Protective Committee is a committee of savings depositors formed in 1946 which has continuously litigated said controversies before the Courts and Congress. It has been continuously licensed by the State of California every year for the past 20 years.

"Appellants" are Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, both of which are sue and be sued U. S. Government agencies. (12 U.S.C. 1464(d) and 1725(c)). Appellant California Savings and Loan Commissioner is "subject to judicial review in accordance with law" (California Financial Code 5258). References to "appellant" herein do not include said California Commissioner unless so stated.

Appellee Equitable Savings and Loan Association (hereafter Equitable) is a California State Guarantee Stock Company. By merger of Long Beach Federal into Equitable, Equitable assumed all Long Beach Federal liabilities. Long Beach Federal's 60,000 savings depositors each received new savings accounts from Equitable. Thus Long Beach Federal's surplus was released for distribution in the form of Equitable stock among Long Beach Federal's 60,000 savings depositors. As a result of the merger, each Long Beach Federal savings depositor became a savings depositor in Equitable. His new account in Equitable equalled his old account in Long Beach Federal. There also became available for distribution to Long Beach Federal savings depositors a bonus of about 13% in the form of Equitable guarantee stock. How this bonus is to be distributed is the issue of these appeals.

Without the \$42,000,000 of new deposits Long Beach Federal was doomed to extinction and ruin.

Long Beach Federal had lost \$69,000,000 of its savings deposits in a run of withdrawals which reduced its 1960 total of savings deposits from over \$96,000,000 to about \$28,000,000.

The disastrous 1960 run was caused by appellants' ^{1/} ex parte seizure and two years of mismanagement of the seized Long Beach Federal. The \$42,000,000 of new savings deposits came into appellee Long Beach Federal when the founding management was restored and the remnants of the seized association were returned from appellants 1960-62 seizure.

Appellants attack the Trial Court's judgments with a multitude of technicalities, i.e., lack of power or jurisdiction to decide against appellants. None of these attacks go to the merits, justice or equity of the Trial Court's judgments.

Behind this smoke screen appellants try to conceal their illegal and arbitrary ^{2/} ex post facto forfeitures of thousands of appellee savings depositors statutory, contract and charter rights to equal and pro-rata distribution of the \$9,500,000 ^{3/} surplus of their mutual savings association. This surplus was created by the very savings deposits appellants would forfeit.

The act of Congress expressly requires that all savings

^{2/} Both the Trial Court (233 F. Supp. 578 at 598 and the 1960 Congressional Investigating Committee (Appx. III hereof) found appellants had acted illegally and arbitrarily and that appellants seizure caused the run.

^{3/} All surplus figures are at 1963 prices of Equitable guarantee stock.

depositors " . . . will share on a mutual basis in the assets of the Association in exact proportion to their relative share or account credits," (emphasis added). (12 U.S.C. 1464(1)).

Appellee Long Beach Federal's Charter makes the same requirement. Appellants' forfeitures are wholly ex post facto made by orders promulgated nearly a year after the savings deposits were made.

See paragraph IX. hereof: "Whatever May Be The Power Of The Board Based Upon Findings Of Fact It Cannot Forfeit Plaintiff's Savings Deposits By Mere Edict or Fiat Issued After The Deposits Were Made". Appellants would mislead this Court of Appeals.

They say appellee Long Beach Federal savings depositors "approved the Merger Agreement overwhelmingly at their meeting" [Opening Brief of appellants Federal Home Loan Bank Board, et al., page 16], thereby implying that appellants' ex post facto forfeitures were approved by appellee savings depositors. But the truth is that:

" . . . 96% of all the votes cast for said merger at said meeting were cast by plaintiffs holding the proxies of savings shareholders and voting such proxies so held. Said ballot by its terms stated that the votes thereby cast were voted in reliance upon the provisions in said Merger Agreement permitting recourse to the Courts for a Court determination of the validity of said attempted preference and exclusion insisted upon by the

defendants Bank Board and Insurance Corporation."
[3R-1136] 3A/

3A/ Said ballots by which said 90% votes was cast read
in part:

"This ballot is cast in favor of said merger
in reliance upon:

- "1. That portion of the merger agreement, proxy
statement, etc., which reads as follows:

'This Agreement is not intended to prohibit
any shareholder member of Long Beach from
taking appropriate action to exercise such
rights, if any, which he may have to contest
the merits or validity of the plan of
dissolution of Long Beach, or any part thereof,
incorporated herein.', and

- "2. The action of the Federal Home Loan Bank
Board, Federal Savings and Loan Insurance
Corporation, et al., in approving said
merger agreement, proxy statement, etc.,
containing said above quoted language.

"DATED this 6 day of July, 1963.

"Executed as proxy holders for and
on behalf of the shareholders whose
savings accounts are listed on
Exhibit 'A' attached hereto.

"ROBERT H. WEBB, JOHN (BEANS) REARDON,
SID ELLIOTT, WINNIE BUCKLIN and
MABEL FERGUS"

STATEMENT

These appeals are to decide whether appellants must follow the Acts of Congress which created them or whether appellants as administrative agencies can ^{4/}repeal, ignore, or amend the express terms of such Acts of Congress. The Trial Court held appellants must follow the Acts of Congress and could not repeal or ignore them. (233 F. Supp. 578 at 592-596, Appx. 1(a)).

The express terms of the Acts of Congress require equal and pro-rata participation of all appellee Long Beach Federal's 60,000 savings depositors in the distribution of Long Beach Federal's \$9,500,000 of surplus. The surplus results from the merger of appellee Long Beach Federal into appellee Equitable. Appellants would forfeit about \$2,500,000 of such surplus by taking it from the thousands of savings depositors to whom it belongs and give it to other savings depositors who have already received their full, equal and pro-rata shares.

The Acts of Congress require mutuality and equality with all savings depositors sharing "on a mutual basis in exact proportion to their relative share account credits". (12 U.S.C. 1464(i) also (a)). Appellants would forfeit thousands of appellee savings depositors by denying them any part of the Long Beach Federal surplus. The \$9,500,000 surplus was created by the very savings

4/ 12 U.S.C. 1464(a-i) creates Federal Savings and Loan Associations as "mutual" associations.

12 U.S.C. 1461-2 contain definitions.

12 U.S.C. 1437 creates appellant Federal Home Loan Bank Board as a "sue and be sued" agency.

12 U.S.C. 1725 creates appellant Federal Savings and Loan Insurance Corporation as a "sue and be sued" United States Corporation.

deposits appellants would forfeit. The forfeited shares are given by appellants to the savings depositors who have already received their full pro rata share. Thus, different classes of preferred and of excluded savings depositors are created by appellants in appellee Long Beach Federal. The preferred classes get their own full pro rata shares of Long Beach Federal's surplus and also get the forfeited shares of their forfeited fellow depositors.

The forfeited savings depositors get nothing.

But there can be no preferred and no excluded savings depositors in any mutual savings association. In a mutual, all must share alike. Otherwise, the association is no longer mutual. ^{5/}

Congress required appellee Long Beach Federal and all Federal Savings and Loan Associations to be completely mutual.

Such classes of preferred and forfeited savings depositors are created by appellants in appellee Long Beach Federal alone. All the more than 2000 other federal savings and loan associations were left as Congress directed, as mutual associations with all depositors sharing equally. But if appellants can forfeit Long Beach Federal's thousands of depositors all rights of all federal savings depositors thereafter exist only at the whim of appellants.

Appellants falsely pretend that Long Beach Federal was harmd and not benefited by the \$42,000,000 of new savings deposits.

But it is undeniable that:

A. Appellants ex parte seizure of Long Beach Federal

^{5/} See paragraph II, page 45 hereof. Federal Savings and Loan Associations are required by Congress to be mutual Associations.



caused a \$69,000,000 run of savings withdrawals by thousands of terrified and intimidated savings depositors.^{6/} This is over 70% of the total deposits of \$96,000,000 on the day of seizure. Only \$30,000,000 (less than 1/3) of its savings deposits remained when the remnants of the wrecked Long Beach Federal were restored to its founding management.

B. The wrecked and damaged remnants of Long Beach Federal had no goodwill when less than 1/3 of its seized savings deposits remained.^{7/} [3R-1138-1140]

C. More than \$42,000,000 of Long Beach Federal's seized assets were used up to pay over \$45,000,000 of demand debts created by appellants seizing employee Supervisory Representative in Charge Ault to appellant Federal Savings and Loan Insurance Corporation after the seizure.^{8/}

Appellants falsely claim the \$42,000,000 of new savings deposits were not needed and should have been rejected by the newly restored management of Long Beach Federal.

But the urgent need for these new savings deposits is self evident.

^{6/} See page 25, 69-70, hereof for details of runs.

^{7/} Plaintiff's Exhibit "8" Settlement Agreement, page 16.

^{8/} For uniformity of record references among all briefs, appellees will use the same references as appellants; i.e., "to the original papers in No. 20378 (D.C. No. 63-1072 PH), No. 20447 (D.C. No. 63-1230 PH) and No. 20522 (D.C. No. 63-1107 PH) are designated "1R", "2R" and "3R", respectively. References to the transcript of the proceedings in the District Court are designated "Tr."."

Upon seizure by appellants a \$69,000,000 run took about 70% of the \$96,000,000 of savings deposits. But \$30,000,000 of deposits remained when the remnants of the wrecked and damaged association were returned to its founding management. After the return of the association the total withdrawals of savings deposits from appellee Long Beach Federal for four months, April 2, 1962 through July 31, 1962, was over \$13,000,000. The total new deposits for the same time was \$49,000,000.^{9/} The net gain for four months was about \$35,000,000. But had there been no new deposits all withdrawals would have been a net loss. The net loss would have been over \$13,000,000. There were only \$30,000,000 left in savings deposits when the Association on April 2, 1962 was restored to its founding management.^{9/} \$13,000,000 is about 44% of this total. If Long Beach Federal had lost 44% of its remaining deposits within 4 months after being restored to its original management the depositors would again have become panic stricken as they had in the 1960 and in 1946 runs.

The 1960 run was \$69,000,000 or 70% of the 1960 deposits of \$96,000,000.

There was bound to be panic and a run if the trend of withdrawals of 1960-1961 had once gotten started. Even with the \$49,000,000 flood of new money coming in over \$13,000,000 went out. What would have been the total withdrawals if no new money came in? The resulting run would have completely wiped out appellee Long Beach Federal.

The forced sale sacrifice of assets needed to raise \$13,000,000 cash (44% of all deposits) to immediately pay withdrawing panicky depositors would have wiped out all surplus, rendered Long Beach Federal insolvent and forced it to close forever.

Only the rapid and widely advertised flow of new deposits into Long Beach Federal prevented panic and disaster. \$24,000,000 of new deposits came in the first two days. Day after day full page ads telling of the daily amounts of such millions of new deposits were placed in the local newspapers. 10/

This alone re-established lost public confidence and prevented disaster.

Yet appellants insist that accepting the \$42,000,000 of new deposits was "a breach of trust". They were not needed, and should have been rejected.

Appellants would thereby have provoked another and third disasterous run of withdrawals which would have completely destroyed Long Beach Federal.

Appellants false claims that the \$42,000,000 of new deposits were "not needed" is coupled with the equally false claim that the \$42,000,000 of new deposits "diluted" the distribution of Long Beach Federal surplus among all its savings depositors.

The truth is that the benefits caused by the \$42,000,000 of new deposits increased the total distribution by about 10 times and each individual savings depositor received about 4 times more



with the new deposits than could have been received without them.
[3R-1137-1139]

Without the \$42,000,000 of new deposits a distribution of only about \$842,000 was possible among Long Beach Federal's thousands of mutual savings depositors. [3R-1138]

With the \$42,000,000 of new deposits about \$9,500,000 became available for distribution. This increased the total distribution about 10 times. It increased the individual share of each savings depositor about 4 times. \$842,000 divided among \$30,000,000 of savings deposits is about 3%. \$9,500,000 divided among \$72,000,000 is about 13%. ^{11/}

Thus the thousands of new savings depositors created the surplus which both old and new savings depositors should share equally. [3R-1138-1140; 3R-1169-1170]

^{11/} See page 16-17 hereof for details of how new deposits increased distributable surplus.

These appeals are the culmination of over 20 years of continuous litigation repeatedly before the U. S. Trial Court, this Court, and the U. S. Supreme Court.^{12/} They deal with a series of financial miracles almost beyond belief.

Appellee Long Beach Federal is a mutual federal savings association wholly owned by its more than 60,000 savings depositors.

Appellee Shareholders' Protective Committee represents and sues on behalf of all said savings depositors as a class.

Appellee Long Beach Federal has been twice seized and wrecked by appellants.^{13/} It has been threatened with other

^{12/} See Trial Court's Opinion (Appx. 1(a) hereof) (233 F. Supp. 78, page 584), for partial list of over 400 pages of reported opinions is part of this litigation.

In Re Woodmar Realty Company, 294 F. 2d 785 (CA-7, 1961), Cert. Denied 369 U. S. 803, 7 L. ed. 2d 550] at page 788:

"[2,3] Counsel first contends that we must pretend that the record facts laboriously compiled in the records and files of the court below in more than twenty years of proceedings do not exist and that we may not on this appeal take judicial notice of such facts. It is elementary that the court below was duty bound to take judicial notice of its records and files in this cause and that it is our duty to take notice of facts which have come to our knowledge through the records presented to us on the several appeals in this same case. (Citing Authorities)"

Wilson v. Loew's Inc., 142 C. A. 2d 183 at 188, footnote 3 contains comprehensive lists of U. S. Supreme Court, Ninth Circuit and other appellate court decisions on the matter of judicial notice taken by both trial and appellate courts of Congressional proceedings, etc.

See also:

Pan American Petroleum & Transp. Co. v. United States, 273 U. S. 456, 71 L. ed. 734 (1927), at U. S. 498-499, L. ed page 744 the testimony before Congressional Committees.

^{13/} Appellant Savings and Loan Commissioner of the State of California is not included in any reference to appellants unless specifically so referred to.

seizures and destruction which were blocked by Federal Court injunctions. (14 F.R.D. 273 and 189 F. Supp. 589.)

The 1946-1948 seizure caused a \$10,000,000 run of withdrawals by terrified and intimidated savings depositors.

The first of this litigation resulted from that seizure in 1946.

In 1948 as a result of Congressional Investigations and Federal Court judgments, appellants returned the remnants of the seized and wrecked association to the same management from which it had been seized. The Court judgments required appellants to account for over \$26,000,000 of uncounted cash, U. S. bearer bonds and negotiable securities for which appellants had refused to give any receipts upon seizure. ^{14/}

Appellants attempts to account were rejected by the U. S. Court.

Long Beach Federal was about to convert in 1960 from a Federal to a California state association. Appellants unable to account for the first seizure and to block the 1960 conversion again seized, wrecked and attempted to destroy Long Beach Federal. A \$69,000,000 run of withdrawals by terrified and intimidated depositors was caused by the 1960 seizure. On the date of seizure savings deposits exceeded \$96,000,000. In the run they dropped to about \$28,000,000.

In 1962 as a result of further Congressional

^{14/} The Trial Court and this Court of Appeals take judicial notice and knowledge of the prior litigation and Congressional proceedings. (See Footnote 12, page 11 hereof.)

Investigations and more state and federal court litigation, appellants returned the remnants of the seized Long Beach Federal again to the same management from which they had seized it in 1946 and in 1960. In 1962 appellants paid over \$5,000,000 in settlement of damage actions by appellees Long Beach Federal and Shareholders' Committee against appellants. [3R-1126-1127; 3R-1140-1141]

In 1963, \$9,500,000 of new surplus was obtained for distribution among 60,000 Long Beach Federal mutual savings depositors represented by appellees. It was caused by the \$42,000,000 of new deposits and the restored goodwill they created. [3R-1139 and 1169-1170]

A \$7,000,000 partial distribution of this surplus in the form of stock of appellee Equitable has been made in 1963 by the Court below, by final consent judgments not directly affected by these appeals. [3R-167-179; 3R-180-190; 3R-307-311] The distribution of the remaining \$2,500,000 of Equitable stock is the subject of the present appeals. ^{15/}

The \$7,000,000 partial distribution was made by appellee Long Beach Federal Savings and Loan Association in 1963-1964 after being twice wrecked and almost destroyed by malicious and punitive repeated seizures and runs inflicted by appellants Federal Home Loan Bank Board, et al. ^{16/}

Appellants' 1960 seizure of appellee Long Beach Federal

^{15/} All stock \$ figures are at 1963 prices of Equitable stock.

^{16/} See page 42-44 hereof for Congressional Investigating Committee's findings re seizures and runs.

caused a \$69,000,000 run which reduced appellee's savings deposits by 70% from \$96,000,000 in 1960 to less than \$30,000,000 in 1962. [3R-1126-1163]

Appellees by Congressional Investigations and State and Federal Court actions, compelled appellants in 1962, to return the remnants of the seized Long Beach Federal and to pay over \$5,000,000 in damages for wrongful seizure. Appellants were also compelled to allow conversion by merger of appellee Long Beach Federal into appellee Equitable. [Pl's. Exh. "8" page 43-48]

But even with these victories only about \$842,000 (not \$9,500,000), [3R-1138] of surplus was then available for immediate distribution among Long Beach Federal's then (1962) only \$30,000,000 of savings deposits.

The difference between a \$842,000 and a \$9,500,000 distribution was created by about \$42,000,000 of new savings deposits which came into Long Beach Federal in 1962. [3R-1136-1137] About \$24,000,000 of these new deposits came into Long Beach Federal within the first two days of its 1962 return to its founding management from appellants' seizures. These are the savings deposits appellants would partially forfeit and penalize.

Appellants were thwarted in their repeated seizures and 20 years of efforts to destroy and ruin Long Beach Federal. Smarting under the \$5,000,000 of damages, they were compelled to pay Long Beach Federal, appellants bitterly resented \$24,000,000 of new savings deposits coming into the wrecked and almost destroyed Long Beach Federal on the very day appellants were ousted by

Federal Court orders.

Appellants made every effort to prevent or minimize any distribution of Long Beach Federal surplus among the 60,000 Long Beach Federal savings depositors who had recovered their seized Association from appellants. [3R-1131]

Appellants required \$3,000,000 of Long Beach Federal's new surplus to be withheld from distribution for 10 years to indemnify appellants against their own wrongs, i.e., appellants' liability to Long Beach Federal's customers for losses caused by appellants' two years (1960-1962) of mismanagement of the seized Association. [Pl's. Exh. "8" page 46] This cut heavily into any possible distribution.

If distribution was made without the new deposits, Federal and State income taxes of about \$3,884,000 were estimated on the \$5,000,000 of damage recoveries and on other Association assets. [3R-1141-1142] This also would have greatly reduced any possible distribution.

Appellants sought to increase, instead of reduce, those unnecessary taxes on the \$9,500,000 distribution.

But the \$42,000,000 of new savings deposits carried with them a 12% tax shelter under 26 U.S.C. 593. 12% of \$42,000,000

is \$5,000,000.^{17/}

A wrecked and damaged Long Beach Federal Savings and Loan Association which in 1962 had just suffered a \$69,000,000 run, (more than 70% of its 1960 savings deposits of \$95,000,000), obviously had no goodwill. [3R-1139 and 1169-1170] But the miracle of \$42,000,000 of new savings deposits in 8 months, \$24,000,000 of which came in two days, partially restored Long Beach Federal's badly damaged goodwill. [3R-1139 and 1169-1170]

Appellee Equitable, solely because of the \$42,000,000 of new savings deposits:

(a) Paid \$3,000,000 (almost one-third of the total distribution of \$9,500,000) for Long Beach Federal goodwill restored by the new savings deposits.

(b) Assumed Long Beach Federal's obligation to withhold another and separate \$3,000,000 of surplus from any distribution for 10 years to indemnify appellants against their own wrongs. Such assumption released this \$3,000,000 for immediate

^{17/} The U. S. Trial Judge commented upon this tax shelter in his opinion of 233 F. Supp. 578 (Appx. I-a hereof) in a footnote at page 599 where he said:

"The Board insists that the large deposits 'diluted' the share of surplus which would go to the small depositors. It is unnecessary to decide that, but it is worthy of note that several hundred of the accounts, whose right to share would be forfeited because they were pledged, are for less than \$500.00, and that the 42 million dollars additional deposits which were in the institution on December 31, 1962, gave the Association a decided tax advantage in enabling it to write off, under the then existing laws, 12½ per cent of that amount, viz.: more than five million dollars, as bad debt reserve. And five million dollars contributing to a tax shelter is not tiddly-winks. . . ."

26 U.S.C. 596 as it was in 1962 permitted any mutual savings association to take 12½% of its total savings deposits as a deduction against U. S. income taxes.

distribution.

(c) Assumed Long Beach Federal's liabilities, if any, for the possible \$3,884,000 of Federal and State income taxes.

Equitable agreed to merge with Long Beach Federal. [3R-1138-1140; 1167] Equitable had almost \$15,000,000 in net worth, surplus reserves, etc. [Pl's. Exh. 7-A-4-3, page 6; also 12/9/63-10-A] This, plus the \$5,000,000 tax shelter created by the \$42,000,000 of new savings deposits obviated any possible \$3,884,000 (or any other) taxation on Long Beach Federal.

The thousands of new savings depositors who created almost all of the \$9,500,000 distribution are now accused by appellants Bank Board of making " . . . a raid on the Federal Association's net worth . . . " and are partially forfeited and penalized from any participation in the \$9,500,000 surplus and distribution they created.

This more than ten times increase in distribution from about \$842,000 to \$9,500,000, is falsely labeled by appellants as a "dilution". Such non-existent "dilution" is then made the pretended basis of appellants forfeitures and penalties against the new savings depositors. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits." . . . " (Emphasis added)

(12 U.S.C. 1464(i); 233 F. Supp. 578 at 592, Appx. I-a hereof.)

In April 1960, appellee Long Beach Federal had \$96,000,000 in savings deposits owned by its then 90,000 mutual savings depositors. They were about to convert their mutual Association from a Federal to a California State Association. By Acts of Congress (12 U.S.C. 1464(1), Appx. I-f hereof), they had an absolute right to make such conversion. No approval of appellant Bank Board was required.^{18/}

In order to block this lawful conversion, appellants in 1960 seized and wrecked the Association. A Congressional Investigation Committee so found (quoted hereafter at pages 42-44 at greater length). It investigated appellants' seizures and condemned them in the strongest language. In 1960 the Committee said:

" . . . The board's . . . action must be characterized as arbitrary and unlawful of the most reprehensible sort. . . . In preventing the conversion the board deprived the Association of a right created by . . . Congress . . . without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power. . . . "

^{18/} Federal Home Loan Bank Board v. Greater Delaware Valley S. & L. Ass'n., 277 F. 2d 437 (CA-3, 1960). In Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. Den. 380 U.S. 915; 13 L. ed. 2d 800]. This Court considered the Greater Delaware Valley Federal decision and said at page 157:

" . . . In that case the Bank Board sought a declaratory judgment voiding the conversion of a Federal Savings and Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. . . ." (Emphasis added.)

This language was by the third Congressional Committee to investigate appellants and their seizures of Long Beach Federal during the 20 years of vendetta by appellant Board against appellees Association and its Shareholders' Protective Committee.

Yet further Congressional inquiries of appellant Board and the Board Chairman's conflicting and contradictory testimony before said Congressional Committee in 1963 are detailed on pages 1-63 hereof.

Appellants falsely pretend they are "protecting" small savings depositors against "dilution" by larger depositors. But the U. S. District Court found, ^{19/} and the truth is, that appellants' forfeitures and penalties are inflicted upon about 1899 savings accounts. Of these:

- (a) 324, or about 17%, are \$500 each, or less;
- (b) 1524, or over 80%, are \$11,000 each, or less; and
- (c) Only 54, or about 3%, are \$100,000 each, or over.

Nor are the forfeitures or penalties upon savings accounts limited to new, or small, accounts. Appellants would forfeit and penalize every savings account which is pledged or assigned as security for any depositor's debt. This is regardless of the size or age of the forfeited savings account.

Hundreds of the forfeited savings accounts have been in the Association and pledged or assigned for five years or longer. Many are tiny accounts from \$500 down to as low as \$20 - \$10 per account. Others range in size up to \$100,000 or more each.
[3R-1642-1706]



But all are forfeited.

Appellants failed to deny in any way before the District Court that the \$42,000,000 of new savings deposits:

- (a) Created the \$3,000,000 of goodwill;
- (b) Released another and separate \$3,000,000 for immediate distribution instead of it being retained for 10 years; and
- (c) Also created the more than \$5,000,000 of income tax shelter which saved about \$3,884,000 of possible income taxes.

With these as undenied (and undeniable) facts before it, the District Court rejected appellants wholly unsubstantiated claims of "dilution" and "breach of fiduciary duty" by appellee Long Beach Federal in accepting the \$42,000,000 of new savings deposits. Inevitably, summary judgment against appellants followed. It is from these rulings that they appeal.

Against the background of these undenied and undeniable facts, this Court of Appeals should carefully scrutinize appellants' briefs. They are replete with misleading distortions, half truths and misstatements, only the most glaring of which can be refuted herein.

20/ Appellants have twice briefed these appeals. Appellants' first briefs made more than 70 references to documents never seen by the Trial Court and never offered or received in evidence. Upon appellees' motions this Court of Appeals required appellants to file new briefs and omit therefrom references to matters never presented to or considered by the Trial Court. (Order of September 20, 1966 by this Court of Appeals in these appeals No. 20522, No. 20447 and No. 20378).

For over 20 years appellants Bank Board have been penalizing and forfeiting Long Beach Federal savings depositors and continuously persecuting the Association. In 1946, the predecessor of appellants made their first ex parte seizure of Long Beach Federal. The seizure was made upon accusations of "unsafe and unfit management".^{21/}

The seizure was completely ex parte, without any notice, hearing, or opportunity to be heard. Appellants sought and obtained scare headline, front-page newspaper publicity of their seizure of the Association and their unfounded charges of "unfit" and "unsafe" management.^{21/}

A \$10,000,000 run of withdrawals immediately ensued. Thousands of savings depositors formed long lines in front of the Association and withdrew nearly one-half of the then total of \$22,000,000 of savings deposits. [3R-1125]

The original Shareholders' Protective Committee of Long Beach Federal was then founded. It has been in continuous existence suing appellants for 20 years. It commenced the first Federal Court action which went to the U. S. Supreme Court.

[1R-5-7] A Congressional Investigating Committee in 1946 heard the appellants' charges from their own lips by the testimony of the then Federal Home Loan Bank Administration officials.

The 1946 Congressional Committee found:

"The action here complained of was not only a disservice to the Government but also a greater disservice to the people for the

protection of whose rights and affairs our Government exists. . . . "

After almost two years (1946-1948) of ruinous operation of the seized Association, appellants returned the remnants of the Association in January 1948 to exactly the same management from which they had seized it. [3R-1125-1126]

The Shareholders' Protective Committee had in 1946-1948 obtained the proxies of an overwhelming majority of all of the savings depositors of the Association. (233 F. Supp. 578 at 584, Appx. I-a hereof) After the 1948 return of the Association, the litigation continued in the U. S. Courts for trial, with the Shareholders' Protective Committee seeking to enforce the Federal Court judgment which required appellants to account for the \$26,000,000 of seized assets of the Association. (233 F. Supp. 578 at 584, Appx. I-a hereof)

Upon the 1946 seizure, over \$26,000,000 of uncounted cash, U. S. Bearer bonds, and negotiable securities, had been taken by appellants. All receipts for the seized uncounted cash and bearer bonds, etc., were refused. [14 F.R.D. 273]

Appellants' first attempted accounting with the U. S. District Court was rejected by that Court. Unable to account, appellants, in 1949, made another seizure order for the liquidation of the Association they had returned in 1948.

This seizure order however, was upon notice, and required a hearing. The U. S. Trial Court promptly enjoined the 1949 seizure and instead required appellants to submit their renewed

charges of "unfit and unsafe management" to the U. S. Courts for trial. [14 F.R.D. 273]

Instead appellants appealed, and after about 4 years, in 1953, the injunction was dissolved and appellants were free to conduct any hearings, or take any action they desired.

Seven years followed, from 1953 to 1960. The litigation continued but appellants did nothing either to submit their charges to the Courts or to conduct any hearing of their own. [189 F. Supp. 589]

Every time the U. S. Trial Court took any step in the pending litigation, appeals or writs were taken by appellants, who thereby effectively blocked any trial ever being had on the Shareholders' Protective Committee 1946 actions for accounting and damages.

In 1959, Long Beach Federal determined to convert from a Federal to a State Association. [Pl's. Exh. 10-A, pages 12-14] Such a conversion was authorized by Acts of Congress, 12 U.S.C. §1464(i), and required no consent or approval of appellants Bank Board.^{22/} Had the conversion taken place, the Association and its Shareholders' Protective Committee would have been free to prosecute the pending litigation for an accounting and for damages, against appellants, without the threat of the Association being seized and liquidated.

^{22/} Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. denied 380 U. S. 915; 13 L. ed 2d 800, March 1965]; Federal Home Loan Bank Board v. Greater Delaware Valley Fed. S. & L. Ass'n., 277 F. 2d 437 (CA-3, 1960) see page 132-133 hereof for quotations.
& 140

The U. S. Trial Court found in enjoining the 1949 threatened seizure, that appellants were then threatening to seize the Association because they were unable to account and that appellants sought to appoint themselves as receivers to obtain control of the Association's litigation against appellants, and thereby dismiss it without trial. [14 F.R.D. 273 at 293-295]

By April 1960, the conversion had proceeded so far that California Savings and Loan Association examiners, on April 6, 1960, entered the Association for the purpose of examining its condition so that the California Commissioner might give his consent to such conversion. [233 F. Supp. 578 at 585]

April 12, 1960, the U. S. Court of Appeals for the Third Circuit, decided Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Association, 277 F. 2d 437, (CA-3, 1960). This decision held that a Federal savings and loan association could convert from a Federal to a State association without appellant Bank Board's consent, and regardless of the Bank Board's opposition.

Just 10 days later, Long Beach Federal was again seized by appellant Bank Board. This seizure was also ex parte, wholly without notice, and was based in a large part upon the then 14-year old and yet untried charges of "unsafe and unsound" management.

Again, with minor exceptions, appellants refused to give receipts for the over \$120,000,000 of seized assets. [Pl's. Exh. "10-B" pages 390-393]

By 1960, the Association had grown to have over

\$96,000,000 in savings deposits, and over 90,000 savings depositors.

The same destructive seizure pattern was again followed by appellants. They deliberately undermanned the 30-teller windows of the Association with only 4 tellers, so that long lines of withdrawing savings depositors again were formed in front of the Association. [Pl's Exh. "10-B" page 810] Front-page scare headline newspaper publicity was obtained by appellants' "press releases". [Pl's. Exh. "10-B" pages 787-789 and 793-803] They even hired a press agent to get their publicity.

As a result over \$69,000,000 of savings deposits were withdrawn by terrified and intimidated Long Beach Federal savings depositors. This was about 70% of all the savings deposits then in the Association.

The Shareholders' Protective Committee was then in its 14th year. It has now been (1966) licensed continuously every year for 20 years, by the State of California. [233 F. Supp. 578 at 591] It obtained new proxies [Pl's. Exh. "2"] from more than a majority of the 1960 savings depositors, and filed new court actions, and sought further Congressional Investigations. [Pl's. Exh. 12/9/63-8 page 15]

The 1960 Congressional Investigating Committee summoned appellants to testify under oath concerning the reasons for the 1960 seizure of Long Beach Federal. The then Bank Board Chairman and Bank Board members who were subpoenaed, appeared before the Congressional Committee and refused to testify on the basis that the seizure was justified and the justification would be fully

disclosed before an administrative hearing to be held by a Hearing Officer. When the administrative hearing convened, appellants Bank Board members and Chairman were subpoenaed by appellees to appear in Los Angeles, California, and state why the Association had been seized and ruined.^{23/}

The then Chairman, members, etc., of appellant Bank Board flouted the subpoenas and refused to appear or to testify.^{23/} They ordered their "handpicked" hearing examiner to rule that no evidence would ever be received as to reasons or justifications, if any, for the ex parte seizure. Instead, only "current conditions" would be heard. [189 F. Supp. 589 at 603-604] Current conditions were:

(a) The Association when seized April 22, 1960 had \$96,000,000 of savings deposits and was indebted to no one;

(b) By the time of the 1960 Administrative Hearing, the Association had, in 4 months, lost over ^{24/}\$60,000,000 of its savings deposits, and but \$35,000,000 remained. The Association was allegedly in debt \$45,000,000 on a new demand debt created by appellant Bank Board in favor of appellant Federal Savings and Loan Insurance Corporation, since the seizure.

Appellants' "handpicked" hearing examiner not only refused to compel the Board Chairman or Board Members to honor the subpoenas and testify, but sought to enforce a hearing on the said

^{23/} L. B. Fed. S & L Assn. v. Fed. Home Loan Bank Board, 189 F. Supp. 589 (1960) at 599 details these events.

^{24/} Another \$9,000,000 of savings deposits were later lost bringing the total run to over \$69,000,000.

"current conditions". The outcome of such a hearing was obvious. The Association, \$47,000,000 in debt, due on demand, with only \$35,000,000 left in savings deposits, was obviously insolvent.

Its liquidation seemed certain.

But neither the U. S. Trial Judge, who has heard this litigation for 20 years, nor this Court of Appeals, would permit such an outrage.

In "handpicking" their hearing examiner, appellants had adopted two resolutions on the same day, one of which, together with correspondence, disclosed that appellants' General Counsel had shopped around and himself selected the hearing examiner who would seal the seized Long Beach Federal's doom.

One only of the two of appellants' resolutions was sent to Long Beach Federal's counsel by registered mail. The other, although passed the same day, and on the same subject, was concealed up the appellants' sleeve for months, to be sprung as a surprise before the U. S. District Court at Los Angeles. ^{25/}

Appellants' General Counsel himself, testified before the 1960 Congressional Investigating Committee "I selected him [the hearing office]." The U. S. District Court in 189 F. Supp. 589, at page 606 at footnote 12, condemned such conduct.

This Honorable U. S. Court of Appeals went even further and in Federal Home Loan Bank Board v. Long Beach Federal Sav. & Loan Assn., 295 F. 2d 403, at page 411, held the selection of the Hearing Officer was a violation of the Administrative Procedure

Act, was illegal and void, and that said "current conditions" could not be used to decide the fate of the seized Association.

This decision of this Court of Appeals was filed in November, 1961.

Within 3 months, on February 14th, 1962, appellants Bank Board, et al., agreed to again return the remnants of the twice seized Long Beach Federal to exactly the same management from which it had been seized in 1946, and to which it was returned in 1948. [Pl's. Exh. "8" Settlement Agreement]

But in 1960-1962, appellee Long Beach Federal had been wrecked and almost destroyed under the two years management of the seizing appellants. Less than \$30,000,000 remained of the original \$96,000,000 of savings deposits. Over \$1,000,000 in operating losses were suffered by the Long Beach Federal in 1962 resulting from the 1960 seizure.

But this time, appellants paid over \$5,000,000 in settlement of damages to the Long Beach Federal for their wrongful seizure and mismanagement of the Association's business. [3R-1140-1141] As part of the February 1962 settlement [Pl's. Exh. "8"], appellants also agreed that Long Beach Federal might convert from a Federal to a State Association, and might, if possible, merge with Equitable. But even here appellants persisted in their destructive and ruinous "supervision" of Long Beach Federal.

Appellants required that \$3,000,000 of Long Beach Federal's assets be withheld from distribution to its depositors and be retained for 10 years as "protection" of appellants Bank

Board and Insurance Corporation, against the actions and claims of the customers of the seized Long Beach Federal for mismanagement and damage inflicted by appellants upon said customers. [Pl's. Exh. "8" page 46]

Upon its 1962 restoration to the founding management, Long Beach Federal was in a precarious condition. It had only about \$30,000,000 of its original \$96,000,000 in savings deposits. Long Beach Federal's goodwill built so laboriously over 28 years by the founding management, was now non-existent. [3R-1138-1140; 3R-1166]

Unless multi-millions of dollars of new savings deposits could be immediately obtained in large volume, Long Beach Federal could not merge with Equitable and might not even survive. Unless Equitable could be persuaded to assume all of Long Beach Federal's liabilities, known or unknown, \$3,000,000 of Long Beach Federal's surplus available for distribution among its savings depositors must be retained for 10 years to protect appellants Bank Board and Insurance Corporation against liability for their own wrongdoing. [Pl's. Exh. "8" page 46]

Long Beach Federal and its management, as well as Equitable's management, when they learned in 1962 that Long Beach Federal would be restored, made monumental efforts to attract and obtain every possible new savings deposit in all amounts, large as well as small. As a result \$24,000,000 in new savings deposits became available to the restored Long Beach Federal within two days after it resumed business under its founding management. And this

growth continued until almost \$42,000,000 in new savings deposits came into Long Beach Federal from April 2nd to the end of November, 1962. ^{26/}

These are the savings deposits appellants Bank Board and Insurance Corporation would ex post facto partially forfeit and penalize. Almost one-half of these new savings deposits or over \$19,000,000 are denied by appellants their just and lawful statutory and charter participation in the surplus of Long Beach Federal, which they helped to create.

These new savings deposits were the blood transfusion that saved the dying Long Beach Federal from the fate appellant

^{26/} Front page newspaper publicity was given to the \$24,000,000 of new deposits received during the first 2 days. Full page ads were placed every day in the local newspapers [Pl's. Exh. 12B]. Movie and T. V. stars made personal appearances at Long Beach Federal and autographed new accounts. They also offered their own new savings accounts of from \$100,000 to \$300,000 each. [Pl's. Exh. 11] One of appellant Bank Board members, its counsel, et al., were photographed with the stars in the premises of Long Beach Federal. [Pl's. Exh. 11]

Appellants now deny any knowledge that dozens of movie and T. V. stars were each opening said \$100,000 to \$300,000 new accounts [3R-1411 and 3R-1359-60] Appellant Bank Board Member Dixon swore in his affidavit that he was in Long Beach, California from March 20 to April 6, 1962, for the purpose of the settlement and return of the seized Association. He says " . . . I then turned over the keys of the Association to Mr. Thomas A. Gregory, its President." [3R-1412] He also swore:

" . . . Newspapers in Los Angeles and Long Beach carried stories as to the amount of deposits at Long Beach following its return to its private management on April 2, 1962. One newspaper account, dated April 3, 1962, stated that the Association's deposits on April 2, 1962 were \$22,776,984. Another newspaper story, dated April 11, 1962, stated that redeposits of the Association in one week were more than '29 million dollars'."

The newspaper ads and front page publicity headlined the \$24,000,000 of new savings deposits and featured the pictures of the movie and T. V. stars. [Pl's. Exh. 12-B]

Bank Board had intended for it.

The undenied affidavits before the U. S. District Court, including that of T. A. Gregory, [3R-1125-1163] President of Long Beach Federal affirmed:

(a) That the approximately \$42,000,000 of new savings deposits increased the amount available for distribution among all savings depositors from about \$842,000 to \$9,500,000. If the Acts of Congress and the Association's charter prevail, this increase of more than 10 times, will be shared equally and pro rata among all \$72,000,000 in savings deposits.

(b) That the increase of more than 10 times the total distribution, although spread among a greater number of savings depositors, yet results in about 4 times more being received by all, both old and new, than would have been received by the old depositors without the increase.

The \$42,000,000 of new savings deposits conferred the following major benefits:

(a) Equitable paid \$3,000,000 in guarantee stock for the goodwill of the restored Association. Said goodwill resulted solely from the new \$42,000,000 of savings deposits. [3R-1138-1140; 3R-1167]

(b) The additional \$3,000,000 to be impounded for 10 years was released for immediate distribution among the Long Beach Federal depositors. Equitable's assumption of all Long Beach Federal liabilities, known as well

as unknown, made this release possible.

(c) Approximately \$3,804,000 of possible income taxes were saved. The \$42,000,000 in new savings deposits under 26 U. S. C. 593 created a tax shelter of 12% or about \$5,000,000. This tax shelter enabled Long Beach Federal to received the \$5,000,000 compensation paid it by appellants Bank Board and Insurance Corporation as damages, tax free. The \$5,000,000 tax shelter also enabled Long Beach Federal to transfer its surplus to Equitable without taxes which might otherwise have wiped out the distribution. ^{27/}

Appellant Bank Board's real purpose in these appeals is apparent, as inadvertently but truthfully stated by its own attorney. Said appellants want to further "penalize" those Long Beach savings depositors who made new deposits in the

Association after it was restored in April, 1962, from the second seizure. 28/

28/ On July 13, 1964, Assistant U. S. Attorney Dooley, one of appellants' attorneys, wrote a letter to counsel for appellee Long Beach Federal. A photocopy of said letter is Appx. I-b hereof. Page 1 of said letter reads in part:

"POSSIBLE SETTLEMENT FORMULA

"1. Long Beach shareholders whose accounts were assigned as security for the payment of local sales taxes should not be penalized provided each such shareholder is otherwise eligible under the merger agreement formula." (Emphasis added.)

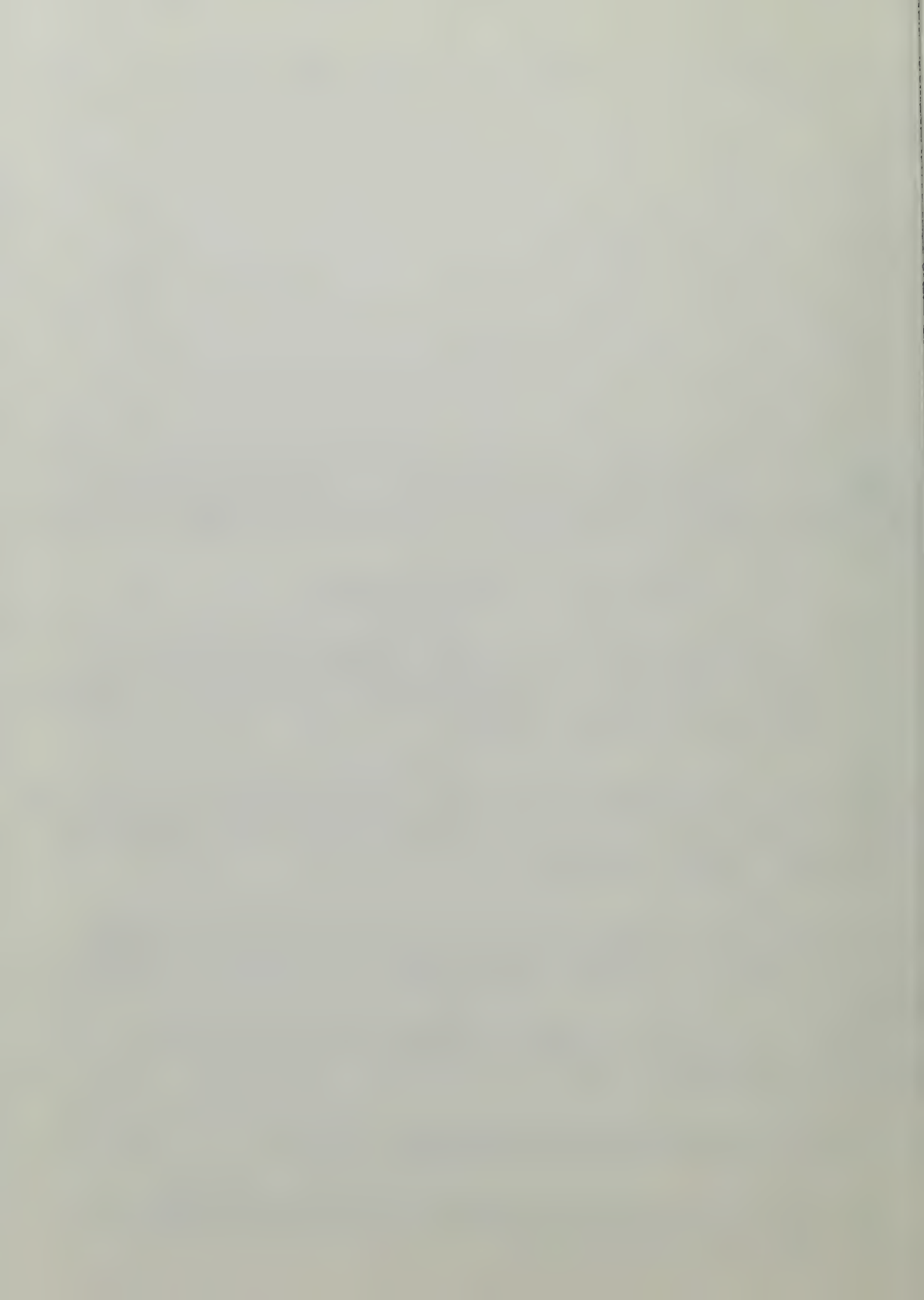
The reference by appellants' attorney to "penalized" as the effect of the Bank Board's illegal forfeitures is an exact and accurate description of what his clients, appellants Bank Board and Insurance Corporation have done to thousands of innocent Long Beach Federal savings depositors.

But appellants' price for saving some Long Beach Federal depositors from being "penalized" by appellants was Long Beach Federal's consent to illegal forfeitures of thousands of other savings depositors, as disclosed by the balance of Attorney Dooley's letter.

Appellees refused to agree to "penalize" their fellow depositors. Appellants therefore forfeited all pledged or assigned deposits regardless of size.

In C. I. R. v. Wilshire Holding Corporation, 288 F. 2d 799, (CA-9, 1961), this Court said at page 800:

" . . . In the conduct of a case, we think that the government must accept the consequences of what its attorneys do."



QUESTIONS

1. Is it breach of trust as appellants contend for officers of appellee Long Beach Federal to accept new savings deposits of \$42,000,000 used to partially rehabilitate the failing savings association after it had been wrecked by a \$69,000,000 run of savings withdrawals caused by appellants^{29/} seizures and efforts to destroy the association?

2. Can Appellants violate Acts of Congress and ex post facto forfeit the statutory and charter rights of thousands of new savings depositors to equal and pro rata distribution of appellee Long Beach Federal's \$9,500,000 surplus created by their \$42,000,000 of new savings deposits?

3. Were \$42,000,000 of new savings deposits a benefit in 1962 to appellee Long Beach Federal in its then precarious financial condition with only \$30,000,000 of savings deposits left after a \$69,000,000 run caused by appellants seizures and 2 years of appellants mismanagement?

^{29/} Both the 1946 and 1960 seizures were by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation and their "Supervisory Representatives, Conservators, etc." Congressional Investigating Committees investigated appellants three times or more. The 1960 Committee said:

" . . . The board's . . . action must be characterized as arbitrary and unlawful of the most reprehensible sort. . . . In preventing the conversion the board deprived the Association of a right created by . . . Congress . . . without mincing words, we may say this is a form of regulatory supervision by blackmail. . . . The Board's action was an arbitrary and unlawful exercise of power . . . "



SUMMARY OF ARGUMENT

1. Appellee Long Beach Federal in 1962 desperately needed the \$42,000,000 of new savings deposits. Its financial condition then was precarious. It had been wrecked and damaged by appellants' 1960 seizure and the resulting \$69,000,000 run of withdrawals by thousands of terrified and intimidated appellee savings depositors. The \$69,000,000 run took 70% of the \$96,000,000 total deposits. Only \$28,000,000 of savings deposits remained in 1962 when appellee Long Beach Federal was released from 2 years of seizure by appellants and the remnants of its seized assets were returned to its founding management.

2. Every dollar of the \$42,000,000 of new savings deposits were an immediate benefit to the wrecked savings association (Long Beach Federal) and to all its thousands of depositors new and old, big and small. Among the many benefits were:

a. \$3,000,000 paid by appellee Equitable for the partially restored goodwill of Long Beach Federal. Without the \$42,000,000 of new savings deposits the wrecked and almost destroyed Long Beach Federal had no goodwill. With the new deposits \$3,000,000 was paid for goodwill.

b. Another and separate \$3,000,000 of Long Beach assets were released for immediate distribution among the thousands of savings depositors instead of being impounded for 10 years. The 10-year impound of \$3,000,000 had been

required by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation to indemnify them against their liability to the thousands of depositors, borrowers and customers of appellee Long Beach Federal for said appellants' own wrongs inflicted during their 2 years of seizure and mismanagement of appellee Long Beach Federal. After \$42,000,000 of new savings deposits came in to Long Beach Federal, appellee Equitable was willing to merge with Long Beach and assume such liabilities. Thus the impounded \$3,000,000 was released for immediate distribution instead of being held for 10 years.

c. About \$3,884,000 of income tax savings resulted from the \$42,000,000 of new savings deposits. Every dollar of new deposits created a 12% tax shelter. Under 26 U.S.C. §593 appellee Long Beach Federal got a \$5,000,000 tax shelter for the year 1962 from the \$42,000,000 of new savings deposits. The new tax shelter helped to protect from taxes the more than \$5,000,000 settlement of damages received in 1962 by appellee Long Beach Federal from appellants for their wrongful seizure and wrecking of appellee Long Beach Federal. Without these, the \$42,000,000 of new savings deposits and said benefits, only about \$842,000 could have been distributed; with the new deposits about \$9,500,000 was distributed.

3. It was not "a breach of fiduciary duty" for Long Beach Federal to accept the new savings deposits so urgently needed to save the association from ruin and extinction. The total

distribution to all savings depositors new and old, big and small was increased more than ten times by the new deposits.

The individual distribution to each and every savings depositor was increased by about four times. \$842,000 divided among \$30,000,000 of savings deposits is about 3%. \$9,500,000 divided among \$72,000,000 (\$30,000,000 of "old" deposits plus the \$42,000,000 of "new" deposits) is 13%. 13% is four times greater than 3%.

4. Appellants claim that the "new" big deposits "diluted" the old small deposits is false and sham.

5. Appellants ex post facto forfeitures of the thousands of new savings depositors statutory and charter rights to equal and pro rata distribution of the \$9,500,000 distribution they created is illegal, arbitrary and void. It violates the Acts of Congress which expressly require equal and pro rata distribution in exact proportion to each savings account balance.

6. Appellants illegal ex post facto forfeitures were promulgated almost a year after the forfeited savings deposits were made.

7. Appellants illegal punitive and ex post facto forfeitures of thousands of appellees' savings deposits is part of the 20 years of vendetta of appellants against appellees.

Twice appellants have seized and wrecked appellee Long Beach Federal (1946-48 and 1960-62). Twice appellants have been compelled by court judgments and Congressional Investigations to return the remnants of the wrecked and damaged savings

association (Long Beach Federal) to exactly the same management from which they had seized it.

A third seizure was threatened and prevented only by a Federal Court injunction.

8. Appellants smarting under the \$5,000,000 of damages they were compelled to pay appellee Long Beach Federal have wrongfully and illegally penalized and forfeited new savings deposits made with Long Beach Federal which has survived appellants 20 years of ". . . arbitrary and unlawful exercise of power . . . action of the most reprehensible sort" and "supervision by blackmail." (See page 42-44 hereof for Congressional Investigating Committee use of these terms to describe appellants.)

ARGUMENT

I.

APPELLANTS' ILLEGAL AND ARBITRARY FORTUITURES AND PENALTIES AGAINST THOUSANDS OF SMALL MUTUAL SAVINGS DEPOSITORS VIOLATE ACTS OF CONGRESS.

For more than 30 years it has been settled law in this Ninth Circuit Court of Appeals (and by the United States Supreme Court) that any administrative order or regulation is a nullity if in conflict with, or contrary to, an Act of Congress.

There are a multitude of Ninth Circuit cases so holding. Five of them are:

1. Federal Maritime Com'n. v. Anglo-Canadian Shipping Co., 335 F. 2d 255, (C.A.-9, 1964);
2. Reynolds v. United States, 286 F. 2d 433 (C.A.-9, 1960);
3. Kirk v. United States, 270 F. 2d 110 (C.A.-9, 1959);
4. Hawke v. Commissioner of Internal Revenue, 109 F. 2d 946 (C.A.-9, 1940);
5. Commissioner of Internal Revenue v. Van Vorst, 59 F. 2d 677 (C.A.-9, 1932).

In Federal Maritime Com'n. v. Anglo-Canadian Shipping Co., 335 F. 2d 255 (C.A.-9, 1964) this Court said at page 253:

" . . . regulations of an agency of the United States must be issued within the powers conferred by Congress. Kirk v. United States,

9 Cir., 270 F. 2d 110, 118. If agency regulations go beyond what Congress has authorized, they are void. Utah Power & Light Co. v. United States, 243 U. S. 389, 410, 37 S. Ct. 387, 391, 61 L. Ed. 791; Hawke v. Com'r of Int. Rev., 9 Cir., 109 F. 2d 946, 949."

In Reynolds v. United States, 286 F. 2d 433 (C.A.-9, 1960), this Court of Appeals said at page 442:

"The regulation appellant was convicted of violating was not authorized by the statute under which it was purportedly issued and was therefore invalid. It follows that the conviction of appellant thereunder is without legal authority and it must be set aside and the judgment reversed."

In Kirk v. United States, 270 F. 2d 110 (C.A.-9, 1959), this Court said at page 118:

". . . Regulations of a department must be issued within the powers conferred by Congress and must be addressed to and be reasonably adapted to the enforcement of an Act of Congress."

In Hawke v. Commissioner of Internal Revenue, 109 F. 2d 946 (C.A.-9, 1940) this Court said at page 949:

"[2] . . . Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment. . . . [citing authorities]

"If the regulations go beyond what Congress can authorize or beyond what it has authorized, they are void and may be disregarded. . . . [citing authorities]"

In Commissioner of Internal Revenue v. Van Vorst, 59 F.2d 677 (C.A.-9, 1932) this Court said at page 679:

"[1] It is well settled that department regulations may not invade the field of legislation but must be confined within the

limits of congressional enactment. . . .
[citing authorities] . . . A regulation
to be valid must be reasonable and must be
consistent with law. . . ."

The United States Supreme Court has also so ruled only
last year. In Dixon v. United States, 381 U. S. 68, 14 L. ed. 2d
223 (1965) the Court said at L. ed. 2d page 228:

"[5] . . . this Court had made it clear
that 'The power of an administrative officer
or board to administer a federal statute and
to prescribe rules and regulations to that
end is not the power to make law. . . but
the power to adopt regulations to carry into
effect the will of Congress as expressed by
the statute. A regulation which does not do
this, but operates to create a rule out of
harmony with the statute, is a mere nullity.'
Manhattan General Equipment Co. v. Commissioner,
supra, 297 U. S. at 134, 80 L. ed. at 531.7. . . ."

"7. See also Miller v. United States, 294
US 435, 439-440, 79 L ed 977, 980, 981, 55 S Ct
440; Lynch v. Tilden Produce Co. 265 US 315,
320-322, 68 L ed 1034, 1035, 1036, 44 S Ct 488."

The above quoted 1965 language of the United States
Supreme Court appears in the opinion of the U. S. Trial Judge
Peirson M. Hall, in 233 F. Supp. 578 (Appx. I-a hereof). In
commenting thereon Judge Hall says at page 592:

"[22] . . . it is a proposition well
established in the law that such regulations
or rules or other action of the Board cannot
be contrary to the Statute, or in excess of
the powers granted by the Statute. As stated
by the Supreme Court. . . ." [quoting the
above language].

In Helvering v. Sabine Transp. Co., 318 U. S. 306, 87
L. ed. 773, (1943) the U. S. Supreme Court said at U. S. page 311,

L. ed. 776:

" . . . We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail . . ."

Appellants forfeitures cannot prevail unless this Court reverses the five Ninth Circuit Court of Appeals cases above quoted, plus the U. S. Supreme Court decision of May 1965, and also repeals the Act of Congress, part of which reads:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits." . . . " (Emphasis added).

(12 U. S. C. 1464 (1); 233 F. Supp. 578 at 592.)

Conversion of Appellee Long Beach Federal from a Federal to a California state association is authorized by Congress without any need for consent of Appellants Bank Board et. al. and without any penalties or forfeitures.

In June of 1960 the Special Subcommittee On The Home Loan Bank Board, Committee On Government Operations, of the 86th Congress, conducted more than a month's investigation of appellants' 1960 seizure of Long Beach Federal. The Congressional investigating committee called before it the Bank Board Chairman, Members, General Counsel, Director of Supervision, etc. The Congressional Committee's report reads in part at page 8:

"NATURE OF THE EMERGENCY

"Did an emergency exist? If it did not,

the Board's case falls to the ground and its actions must be characterized as arbitrary and unlawful and of the most reprehensible sort. We so characterize the Board's actions. . . . there was overwhelming evidence that no emergency existed."

At page 12:

"THE CONVERSION ISSUE

"If there can be said to be an emergency which prompted the Board to seize Long Beach Federal, it was not related to the financial or business affairs of the association but to its desire and plan to convert from a Federal to a State-chartered association.⁷ This kind of emergency, we may note, has no sanction in law as a basis for summary seizure."

"7. Conversion is permitted by a law enacted in the 80th Cong., now being sec. 5 (i) of the Home Owners Loan Act of 1933 as amended." [12 U.S.C. §1464 (i) quoted above.]

At page 14:

" . . . by preventing the conversion move, the Board deprived the association of a right created by the (80th) Congress in 1948 (62 Stat. 1239)."

At page 15:

"Without mincing words, we may say this is a form of regulatory supervision by back-mail. . . ."

And at page 19:

" . . . the Board's action was an arbitrary and unlawful exercise of power."

(The full 25 page committee report is separately bound as Appendix III hereof)

This Court on a prior appeal in this same litigation took judicial notice and knowledge of such Congressional proceedings, testimony, and committee report in Federal Home Loan Bank Bd. v. Long Beach Federal S. & L. Ass'n., 295 F. 2d 403 at p. 410 (C.A.-9, 1961) and then held appellants Bank Board, et al. had violated the Administrative Procedure Act.

Appellants Bank Board by forfeiting thousands of appellee Long Beach Federal's new savings depositors is continuing its policies labeled by the Congressional Committee as "an arbitrary and unlawful exercise of power" and "regulatory supervision by blackmail". 30/

30/ See page 42-44 hereof for discussion of Congressional Committee Investigations and reports of appellants.

II.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS ARE REQUIRED BY CONGRESS TO BE "MUTUAL" ASSOCIATIONS.

Title 12 U. S. Code §1464 (a) gave the Federal Home Loan Bank Board the power to create Federal Savings and Loan Associations. It reads:

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of Associations to be known as 'Federal Savings and Loan Association,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Emphasis Added)

Over thirty years ago the then Federal Home Loan Bank Board acting under this authority prescribed a form of charter for all Federal Savings and Loan Associations throughout the United States.

On July 10, 1937, Long Beach Federal Savings and Loan Association obtained its present charter. It had been organized in 1934 under a similar charter. Congress had required that Federal Savings and Loan Associations be "mutual" and pursuant to this Congressional requirement, the terms and language of the charter prescribed and issued by the then Bank Board to Long Beach Federal Savings and Loan Association was and yet remains "mutual".

It provided in paragraph 9 of the Charter:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." (Emphasis added)

All charters of all 2000 Federal Savings and Loan Associations, both Charter N and Charter K, yet contain similar provisions.

The U. S. Supreme Court has on several occasions considered the nature of the relationship under such charters between a federal savings and loan association and its shareholders. The Court has held that for all practical purposes, such shareholders have identical rights with depositors in mutual savings banks.

In Society for Sav. vs. Bowers, and the companion case of First Federal Savings and Loan Association of Warren vs. Bowers, 99 L. ed. 950, 349 U. S. 143, the Supreme Court was considering the rights of the State of Ohio to tax the mutual savings banks and the federal savings and loan associations in Ohio. The U. S. Supreme Court said at U. S. page 144-145, L. ed. page 956:

"Society for Savings in the City of Cleveland and First Federal Savings and Loan Association of Warren,³ two mutual savings banks having no capital stock or shareholders, and located in Ohio, attack the validity of an Ohio property tax, . . ."

"3. Society for Savings was incorporated under Ohio law, and First Federal under the Home Owners' Loan Act of 1933, as amended, 48 Stat 128, 12 USC §§1461 et seq. Nothing turns here on the difference in their origins."

Further at page U. S. 149-150, L. ed. 959 the Supreme Court said:

". . . The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, . . ."

The merger of Long Beach Federal into Equitable was because of the \$42,000,000 of new deposits, such was a "solvent liquidation of Long Beach Federal." It was "conversion by merger".

In Porter v. Aetna Cas. & S. Co., 8 L. ed. 2d 407, (1962) the U. S. Supreme Court considered the matter of Federal Savings and Loan deposits. In a separate opinion Mr. Justice Douglas said at L. ed. pages 410-411:

"SEPARATE OPINION

"Mr. Justice Douglas.

"By the standards announced in the earlier decisions share accounts in federal savings and loan associations are 'investments.' See Wisconsin Bankers Asso. v. Robertson, -- App DC --, 294 F. 2d 714. They can be

withdrawn only after 30 days' notice. The owner of a share account is a voting member of the association which, as the Court of Appeals noted, makes him 'more nearly comparable to a stockholder of a bank than one of its depositors.' -- App DC --, 296 F. 2d 389, 392. Moreover, the Home Owners' Loan Act, under which this federal association was created, makes clear that its purpose is 'to provide local mutual thrift institutions in which people may invest their funds.' 12 USC §1464 (a). (Italics added.) Its capital¹ is in 'shares' (12 USC §1464 (b)) such as are involved here. The holders of savings accounts who apply for a withdrawal of funds do not thereby become 'creditors.'²

"1. 'Capital' means 'the aggregate of the payments on savings accounts,' plus earnings, less deductions. See 12 CFR §541.3. 'Savings account,' such as we have here, is 'the monetary interest of the holder' in the 'capital' of the association. Id., §541.4. The account book evidences 'the ownership of the account and the interest of the holder thereof in the capital' of the association. 12 CFR §545.2 (b).

"2. 'Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.' 12 CFR §544.1 (a) par 6."

The validity of the mutual charters issued by the Federal Home Loan Bank Board to federal savings and loan associations has been upheld by the federal appellate courts.

In Wisconsin Bankers Association v. Robertson,

(a) 190 Fed. Supp. 90 (DC-D.C. 1960);

(b) 294 Fed. 2d. 714 (CA-D.C. 1961);

(c) Certiorari denied 7 L. ed. 2d 338; 368 U. S. 938.

The United States District Court said in 190 Fed. Supp.

at page 94:

" . . . the regulations and charter changes promulgated by the defendants are within their statutory authority and are authorized and legal. . . . "

The U. S. Court of Appeals for the District of Columbia affirmed the District Court and said in 294 Fed. 2d at page 717:

"The mere statement of the regulations and charter provisions referred to in the preceding paragraph refutes the allegation of illegality with respect to them, particularly in view of the fact that we hold valid the regulations which define 'capital' and 'savings account.' All the challenged provisions seem to us to be consistent with the statute, and to have been validly promulgated thereunder. As the District Court so held, its judgment will not be disturbed."

In Huntington v. Nat. Savings Bank, 96 US 388, 24 L. ed 777 (1878) the U. S. Supreme Court was deciding the rights and liabilities of depositors in a mutual savings bank. The Supreme Court said at L. ed pages 778-779:

"[such interests] . . . can be determined only after a careful examination of the defendant's charter. The Corporation was created by an Act of Congress, . . .

"The object of the institution was declared in the 4th section. By that it was enacted that 'The Corporation may receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose,' and invest the same in the manner therein described. The section then added: 'The income or interest of all deposits shall be divided among the depositors, or their legal representatives, according to the terms of interest stipulated.'

" . . .

" . . . A corporation created by statute can exercise no powers and has no rights except such as are expressly given or necessarily implied. . . . But the charter, when conferring the power to receive money on deposit, limits it to receiving for 'the use and benefit of the depositors,' and directs how it may be invested. It further declares that 'The income or interest of all deposits shall be divided among the depositors or their legal representatives,' . . ." (Emphasis by U. S. Supreme Court.)

Until 1933 there were no federal savings and loan associations. They were created pursuant to the act of Congress passed in June 1933, as sections 5 and 6 of the Homeowners' Loan Act of 1933. (12 U.S.C. 1464 (a)).

That they were to be mutual associations is demonstrated by the history of this legislation and the rules and regulations of the Federal Home Loan Bank Board thereunder as set forth by the then General Counsel of the Federal Home Loan Bank Board, Horace Russell, in his book "Savings and Loan Associations" published in 1956. From 1932 to 1938 he was General Counsel of the Federal Home Loan Bank Board. He is the author of the charters of all Federal Savings and Loan Associations created during that period of time [Appellee Long Beach Federal was created in 1934]. He was also the author of the Federal Home Loan Bank Board regulations creating federal savings and loan associations as mutual associations.

Chapter 7 of his book is titled "The Federal Savings and Loan System". In it the former General Counsel for the Bank Board

says in part at page 61-63:

" . . . I had become convinced that the mutual savings banks were the best example of thrift institutions ever developed anywhere. . . . I saw no reason why we could not authorize Federal Savings and Loan Associations and provide the simplest possible form of a mutual savings institution and use the same primarily for sound and economic home finance.

"It was with this background that the legislation was drafted in April, 1933, and finally enacted June 13, 1933, as Section 5 and 6 of Home Owners Loan Act of 1933.

" . . . In the midst of the utmost pressure as General Counsel of the Federal Home Loan Bank System, . . . I drafted proposed rules and regulations, including a charter and by-laws, and all of the essential forms, to organize and operate an association. . . .

" . . .

" . . . During the approximately six-year period that I was General Counsel of the Board, I sat with the Board at all times it was in session. . . . There had been a few inquiries about Federal Savings and Loan Associations, most of which I think were referred to me. I laid this fifty-page draft on the Board table, with a clean copy for each Board member, and suggested that it appeared to be our duty to proceed with the associations and that there might be some criticism from Congress or the Administration unless we did proceed promptly. About one week later, I brought the question up again and the entire program was adopted as drafted." (Emphasis added)

In Intermountain Building & Loan Ass'n. v. Gallegos, 78 F. 2d 972 (CA-9, 1935) (Certiorari denied 80 L. ed. 454, 296 U. S. 639), our Ninth Circuit Court of Appeals was considering the status of various members of a savings and loan association. The Court of Appeals said at page 980:

"It is fundamental that a building and loan association may not issue preferred stock. In 4 R. C. L. 350, we find the following language: 'The pledge of the assets of a building association for the retirement of a certain class of its stock, in preference to others, is so violative of the elementary requirements of equality and mutuality as to be absolutely void.'"

Yet a preference is exactly what appellants are requiring.

A preference of all mutual savings investors in Long Beach Federal who have less than \$10,000 in their respective accounts, or who have not pledged or assigned their accounts for a debt. They are to be preferred over all other mutual savings investors who happened to have, more than \$10,000 in their respective accounts, or who have pledged or assigned their accounts as security for any debt.

Those with less than \$10,000 and who have not pledged or assigned their accounts, are to receive their full charter rights, i.e., their pro rata share in the distribution of earnings, surplus, undivided profits, and reserves. They are also to receive in addition to their own share, the shares and charter rights of all other mutual savings investors whose accounts exceed \$10,000 each, or who have pledged or assigned their accounts for any debt.

Thus accounts of \$10,000 or over, or which are pledged or assigned, are to forfeit their charter rights to their pro rata distribution of the earnings, surplus, undivided profits and reserves.

The use of the word "mutual" in regard to a savings association compels equality and pro rata distribution.

In Pacific Coast Sav. Soc. v. Sturdevant, 165 Cal. 687, (1913), the California Supreme Court said at page 692:

"The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared-- that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted on a basis of strict mutuality, equality, and fairness. To permit one member, or one set of members, to be paid in full at the expense of others who get less is not to carry out that scheme or agreement, . . . ' . . . The basis of the distribution, in such cases, is not the rule of the association expressed in its by-laws, standing alone, but the supreme rule of equality and mutuality, and the controlling inquiry is the amount paid in by the member, not the date of the issue of his stock nor that of its maturity or of any notice to withdraw.'"
(Emphasis added)

There can be no valid discrimination in favor of one and against another mutual depositor in a mutual Federal savings and loan association.

In Wood v. Hamaguchi, 207 Cal. 79 (1929), the California Supreme Court was considering the rights and liabilities of stock holders in a California bank. The California Supreme Court said at page 85:

" . . . The Constitution knows no distinction

between persons, and the legislature cannot discriminate or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation; that is to say, it must operate equally on all persons and upon all things upon which it acts at all.

"Where, under the Constitution, a law must impose some indeterminate liability upon a class of persons, as, for example stockholders of a corporation, it must impose the liability, at whatever rate it may be fixed, upon all alike, and cannot exempt one any more than it can exempt all; nor can it attach a lower rate of liability to the stockholders of one corporation than it does to the stockholders of another."

III.

ANY UNEQUAL DISTRIBUTION AMONG MUTUAL SAVINGS
DEPOSITORS PREFERRING ONE AND EXCLUDING OTHERS,
VIOLATES THE ACT OF CONGRESS AND IS VOID.

By 12 U. S. C. 1464 (a), Congress required all Federal savings and loan associations to be mutual. Equality is the essence of every mutual association. The moment one group of depositors is favored and all others are excluded, the association is no longer a mutual association.

Defendant Bank Board "approves" distribution only to Long Beach Federal depositors whose accounts are under \$10,000 each and which are unassigned and unpledged. The Board excludes all other depositors. This requires an unequal and preferential distribution.

The depositors preferred by the Board take all. They take their own equal share plus the shares of the depositors excluded by the Board. The excluded depositors take nothing. Such preference destroys equality and mutuality.

Defendant Bank Board claims its power to take the property of one group of depositors and give it to another flows from Bank Board regulation 12 C. F. R. 546.4 which reads in part:

"§546.4 Voluntary dissolution.

" . . . If it appears to the Board that dissolution is advisable and that the plan of dissolution submitted is in the interest of all concerned, the Board will approve the plan; if the plan submitted appears to be inadvisable,

the Board will either make recommendations to the association concerning the plan or disapprove it. . . ."

12 U. S. C. 1464 (a) gives the Board power to prescribe regulations.

But such power does not extend to repealing the Act of Congress.

Congress says Federal savings associations must be mutual with all depositors sharing equally. The Board says Long Beach Federal depositors must be unequal, with those the Board favors taking all and those the Board dislikes taking nothing.

Thus the Board violates and repeals the Act of Congress. If this regulation is valid the Board and not the Act of Congress decides whether any Federal savings and loan is, or is not, a mutual association.

There are over 2,000 Federal savings and loan associations with many billions of assets. The Board may today permit one association in Chicago to remain a mutual with all depositors sharing equally. Tomorrow the Board may order another association in New York to distribute its assets only to savings accounts of \$100 or \$10, or less.

If the Board can thus pick and choose which mutual savings depositors share in their Association's assets and which lose everything, the whims of the Board are substituted for the Act of Congress and the United States Constitution.

The individual ownership of every savings depositor in the assets of his mutual Federal savings association will then depend, not upon the Association's charter or Act of Congress, but

upon the caprice and pleasure of the Board.

This is demonstrated in our Long Beach Federal case. From July 1962 to April 1963 the Board insisted that only Long Beach depositors whose accounts were over \$100,000 each must lose their share of the Long Beach Federal surplus [233 F. Supp. 578 at 585] [Pls. Exh. 21-41 page 6].

When the Association refused to yield to this unlawful exaction the Board required all accounts over \$10,000 each to lose their charter rights and also discriminated against all savings accounts pledged or assigned, regardless of size.

See Section I page 39-44 hereof for decision of this Court holding regulations are void if in conflict with Acts of Congress.

IV.

ANY PREFERENCE OF ONE CLASS OF SAVINGS DEPOSITORS
(SHAREHOLDERS) OVER ANOTHER MUST BE PLAINLY
STATED IN THE PASSBOOKS GIVEN TO THE SHAREHOLDERS

The Bank Board has for many years required by regulations enacted by the Board, having the force and effect of law, that any preference of any one group or class of savings investors over any other group or class in the same institution, must be clearly set forth "in easily read type" so that all savings investors may know, at the time they make their investment, which are the classes to be preferred or discriminated against, and the basis, extent, and type of such preference or discrimination.

Code of Federal Regulations, Title 12, Section 563.3 reads in part:

"§563.3 . . . Every share, membership, or deposit certificate, passbook, or other instrument evidencing a withdrawable investment hereafter issued by an insured institution, which pays or proposes to pay a different rate of dividends or interest upon different classes of shares or securities, which prefers, or proposes to prefer, either as to time or amount of participation in earnings or assets (except by way of a bonus plan), any one or more classes of shares or securities, . . . must, unless the Corporation specifically permits omission of one or more of such recitals, include in its provisions, and display in easily read type, a full and understandable statement of the method. . . . or the dividend provisions, or both, under which the institution operates, and the charge or charges, if any, for the privilege of becoming, remaining, or ceasing to be a savor or investor in the institution." (Emphasis added).

Certainly if savings accounts of less than \$10,000 each, which are not pledged or assigned, are to receive more of the Association's surplus than other accounts of more than \$10,000 each, or which are pledged or assigned, and are to receive none of the surplus, thereby a preference is created.

Such preference to be valid must have been "displayed in easily read type" (12 C. F. R. 563.3) in the passbooks of the savings investors against whom such preference of about \$2,500,000 is to be inflicted. This was never done. It could not be done because the Bank Board did not attempt such preference until long after all the thousands of savings passbooks affected had been issued and the money deposited. The regulation was never repealed or amended. ^{31/} It was simply ignored.

These regulations have the force and effect of law and are binding upon the Bank Board as well as all savings depositors of insured savings associations, state and federal.

In Service v. Dulles, 354 U. S. 363, 1 L. ed. 1403, U. S. Supreme Court - 1957, the Secretary of State ignored his own regulations and discharged an officer of the State Department in violation of said regulations. The U. S. Supreme Court reversed and said at U. S. page 388, L. Ed. page 1418:

" . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited

31/

See page 75-76 hereof for details of how appellants own employees issued thousands of such passbooks to Long Beach Federal depositors for years during the 2 seizures 1946-48 and 1960-62.

from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed with-
out regard to them. . . ." (emphasis added.)

In United States v. Shaughnessy, 347 U. S. 260, 93 L. ed 681, U. S. Supreme Court - 1953, the Attorney General of the United States made an order for deportation of an alien in violation of his own regulations. The U. S. Supreme Court reversed and said at U. S. page 267, L. ed. page 686:

" . . . In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

APPELLANT'S SWORE TO CONGRESS THAT ALL SAVINGS
DEPOSITORS BIG AND SMALL, OLD AND NEW ARE
TREATED ALIKE

On May 7th, 1963, Appellant Bank Board Chairman and all members of the appellant Board together with their legal counsel were again before the Congressional Committee. Board's then Chairman McMurray testified:

"Mr. WILSON. Mr. Chairman, thank you.

"Mr. McMurray, is there a financial limit of any sort on the size of an account that would be accepted by the Federal Savings and Loan Association?

"Mr. McMURRAY. No, sir.

"Mr. WILSON. If a customer, for example, deposited \$100,000 with a Federal savings and loan association, he would be entitled to the same dividends, rate of interest, any other benefits as the hundred-dollar depositor?

"Mr. McMURRAY. Yes, sir. Of course there might be problems. Some institutions, I know, themselves, limit the size or the conditions under which they would accept it because, if it is a small institution, a sudden withdrawal of a sizable account could create some problems for it.

"Mr. WILSON. This would be a policy of the association?

"Mr. McMURRAY. That is correct.

"Mr. WILSON. The only difference, then, really, between the large depositor and the small depositor, the one under \$10,000, would be that the large depositor doesn't have insurance above the \$10,000?

"Mr. McMURRAY. That is correct. He would have, in effect, only 10 percent of his account insured. Although, as I pointed out, as a practical matter, up to now anyway, we have, in effect, taken care of all the accounts, no matter what the size.

"Mr. WILSON. Can the Home Loan Bank Board require different treatment for different size depositors in an association?

"Mr. McMURRAY. Not that I know of, sir.

"Mr. WILSON. You cannot tell them to treat those who are insured or those who are considered small depositors any different from those who are large depositors?

"Mr. McMURRAY. No, sir. They are treated exactly the same.

" . . .

"Mr. WILSON. I am interested. We have a well-known case in southern California that has come to my attention on many occasions. That is the *Long Beach Federal Savings and Loan* case.

"Mr. McMURRAY. Yes, sir, I am very familiar with it, sir."

[Pls. Exh. "22" pgs. 30-31]

Bank Board Chairman McMurray also testified on January 24, 1963, before a different Committee of Congress. The Independent Offices Appropriations for 1964, Hearings Before a Subcommittee of The Committee on Appropriations, House of Representatives, Eighty-Eighth Congress, Government Printing Office's printed transcript cover page and pages 245, 247, 250 and 251 [3R-1293-1297(Exh. A)].

Bank Board Chairman McMurray, at that time testified in part at page 250 and 251:

"Mr. Thomas. Your Federals are all mutuals?

"Mr. McMurray. Yes, sir.

" . . .

"Mr. Thomas. . . .

"If you were to dissolve the System tomorrow, where do the assets go?

"Mr. McMurray. To whom would they go?

"Mr. Thomas. Yes.

"Mr. McMurray. In a mutual association to the shareholders.

"Mr. Thomas. Each individual depositor would share in them?

"Mr. McMurray. Yes, sir.

"Mr. Thomas. How would you divide that profit? Is there any profit stored up or is it a paper profit?

"Mr. McMurray. There are also reserves, sir.

"Mr. Thomas. How do you figure out the reserves? Here is a man who has been a depositor say of a thousand dollars for 10 years. One has been a depositor for 20 years of a thousand dollars. One is a depositor of the same amount of money for

a year. Would you figure it out on the basis of time? How would that distribution be made?

"Mr. McMurray. Actually, the way you would have to figure it out is every shareholder is equal to each other in terms of the share that they have of the reserves.

"Mr. Thomas. That is the point. What share of the reserves does that individual have? He has been in the System with the same amount of money, 10 years, 20 years, and 1 year.

"Mr. McMurray. It would be the same. The idea is these mutual associations will live forever and they serve a perpetual need in the community. This, of course, raises some questions about the conversion from a mutual to a stock association where the present shareholders 'divvy' the surplus and the past shareholders do not. That is why some people I have heard argue against the right of associations to convert into stock companies because someone gets something for free." (Emphasis added.) [3R 1290-1291]

(But Congress said they must all share alike 12 U. S. C. 1464 (i) quoted on page 42 hereof.)

This and other similar testimony by the same Bank Board Chairman, before other Congressional Committees provoked the comment by the U. S. Trial Court in its opinion, 233 F. Supp. 578, (Appx. I-a hereof) at page 599, footnote 4:

"Throughout the merger negotiations and since these suits were filed, the position of the Bank Board is precisely contrary to the public statements of Professor McMurray as Chairman of the Board (now resigned) which reflected an almost trapezical agility to shift, depending on whether or not he was talking to a Congressional Committee, to the public, or to Long Beach Federal. Professor McMurray testified that all Federal mutual depositors share alike on dissolution, whether they have been in the system one year, ten years, or 20 years, when he appeared before the House Committee on Appropriations on January 24, 1963. And on May 7,

1963, he testified before the House Committee on Banking and Currency that all depositors in Federal mutuals were treated alike, whether \$100.00 or \$100,000.00, and whether pledged or not; and in a public speech in New Orleans on March 2, 1964, he again emphasized the necessity for equality of treatment in Federal mutuals."

At the very time of such testimony, about \$19,000,000 of Long Beach Federal's savings deposits were being partially forfeited and penalized by appellants.

In May 1963, the Board was directed to report in writing to the Congressional Committee what it was doing about the Long Beach - Equitable merger. [Pls. Exh. "22" pg. 38]

Only then did the Bank Board agree that Article VII of the merger agreement could include the language:

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein."

From July of 1962 until April of 1963 the Bank Board sought to exclude only savings deposits that exceeded \$100,000 each. No effort was made to forfeit the surplus of those under \$100,000 or those who pledged or assigned their savings accounts. [Pls. Exh. 21-41 pg. 6]. But when Long Beach Federal refused to violate its charter and the Settlement Agreement which both require equal and pro rata distribution of surplus in proportion to the balances of all savings accounts regardless of size, the Bank Board leveled its blunder-buss. It aimed at the mass of 30,000 accounts of 60,000 innocent savings depositors. It forfeited all

accounts over \$10,000 to the extent they exceeded \$10,000 per account. It also forfeited all accounts regardless of size pledged or assigned to secure any debt.

When Long Beach Federal's founding management and the Shareholders' Protective Committee yet refused to sell out one group of shareholders to save others, appellant Bank Board fired its double barreled blunderbuss. It well knew that the random and scattering blasts would strike some and miss others; would wipe out \$500 and \$1,000 savings account holders and transfer their shares of Long Beach Federal's surplus to the up to \$10,000 and multiple account holders.

When the Bank Board pulled the trigger it had before it the individual savings records of every savings depositor who had pledged or assigned his savings account. It also had before it the individual savings records of every savings account of \$10,000 or more. [Pls. Exh. 21-62A page 4] If there were any "pickpockets" among these thousands of innocent savings depositors the Bank Board could every easily have singled them out. [Pls. Exh. 21-62A pg. 4]

Long Beach Federal repeatedly had offered to deposit in court the share of Long Beach Federal's surplus belonging to anyone or more savings depositors which the Bank Board named and accused of any fraud, wrong, or violation of law. [Pls. Exh. 21-16 pg. 4]

This appellant Bank Board repeatedly refused to do. It well knew there was no wrong done and no law violated. Hence no

findings, or even accusations, of any wrong or crime were made by appellants.

So, instead of letting Long Beach Federal or its shareholders go to court on the 54 accounts of over \$100,000 each the Bank Board deliberately and knowingly fired its blunderbuss into the crowd to maim and forfeit, to confuse and stampede. Perhaps another run could be started as in 1946 and in 1960.

But the Bank Board again misjudged the Long Beach savings depositors. They had rallied after the 1946 seizure and the \$10,000,000 run and again after the 1960 seizure and its \$69,000,000 run.

They had seen both State and Federal Courts hold joint sessions in their seized savings association in 1962 to oust the Bank Board's "Supervisory Representatives in Charge". Congress was also quick to answer their cries for help.

The Long Beach shareholders refused to victimize each other. Those left standing refused to take the forfeited shares of their fellow depositors laid low by the Bank Board's blunderbuss. Instead they united and voted 99.4% to complete the merger and then go to court for distribution of the \$9,500,000^{32/} available from the merger. [Pls. Exh. 12/9/63-6 pg. 3; 12/9/63-8 & 7-A-4-5] The entire surplus was put in court for the court to divide equally and pro rata or as the court might decide. And the Long Beach depositors knew it might take another 20 years more of

court litigation to "do it again".

But this time trial court justice was swift. Orders to show cause were issued in 1963 by both State and Federal Courts to the Bank Board [3R 119-124]. The Federal Court also required a copy of the class action complaint to be mailed to all shareholders and to be published in local daily and other newspapers. [1R 122-126 & 3R 297-299; 2R 154-170 & 3R 350-406; 3R 180-214 & 3R 298-311]. Any savings depositor who wanted to take for himself some other depositors pro rata share, as the Bank Board ordered, had every opportunity to do so.

None did. Only one appeared and claimed (for less than \$200) but he later dropped out. [233 F. Supp. 578 at 591]

Now the Bank Board again faces the same Federal Appellate Court it has faced since 1946. The same court it told in 1960 that "current conditions" were to govern the life or death of the then seized Federal savings association. "Current conditions" in 1960 were a solvent, prosperous and growing savings association (Appellee Long Beach Federal) with \$96,000,000 in assets and not in debt to anyone when seized in April 1962. By September 1962, 4 months later, the seized Association had lost \$69,000,000 (over 70%) of its savings deposits in a run of withdrawals and was alleged to owe a \$47,000,000 demand debt to Federal Savings and Loan Insurance Corporation, the alter ego of the seizing Bank Board.

With only \$28,000,000 of savings deposits left and \$47,000,000 in debt, the Association's doom appeared to be certain.

But neither the United States District Court nor this United States Court of Appeals for the Ninth Circuit would permit such injustice. The Trial Court said in Long Beach Federal v. Federal Home Loan Bank Board, 189 F. Supp. 589, (1961) at pages 603-604:

" . . . While the Supervisory Representative has been in charge and possession of the Association, deposits of the Association were withdrawn in the sum of approximately 60 million dollars between April 22, 1960, when its deposits were approximately 95 million dollars, and July 31, 1960, when its deposits had dropped to approximately 35 million. To limit the hearing to whether or not grounds 'currently' exist for the appointment of a conservator would make a dead letter of the provisions of Section 503 (d) (1) of the Housing Act of 1954 relating to the appointment of a conservator, and would press dangerously close to a denial of due process. April 22, 1960 was the last date the Association had possession and control of their property and records, and the last it or its management can be held responsible for any of the things charged in either Order No. 13,372 or Order No. 13,440. Neither it nor its officers can be held responsible for what the Supervisory Representative in Charge, acting under the control of the accusing Board during that period, has done since.

" . . .

"To hold that only the current condition of the affairs of the Association can be inquired into under Order No. 13,440 without examining whether grounds existed for the appointment of a conservator on April 19, 1960, would be similar to executing a judgment on the filing of a complaint, and then limiting the trial to whether or not the defendant had any property at the time of trial. It is like trying to 'unring a bell'. The illustration may seem harsh, but it is apposite, and illustrates the unsoundness of Respondents' objection above-mentioned, not only as being contrary to the Act, but fraught, as well, with violation of due process."

And this United States Court of Appeals for the Ninth Circuit said

in Federal Home Loan Bank Board vs. Long Beach Federal, 295 F. 2d 403, (1961) at page 411:

" . . . (2) since the Association's ousted management cannot be held responsible for what the supervisory representative in charge has done since the seizure on April 22, 1960, the question of whether a conservator should be appointed, which is the prime issue in the administrative proceedings under Resolution No. 13,440, is to be determined with reference to the facts as they existed prior to the seizure effectuated on April 22, 1960, when the supervisory representative in charge took possession and control of the premises, assets and property of the Association."

The Congressional Investigating Committee found as to the damages inflicted by appellants in the first six weeks of the two year 1960-1962 seizure of appellee:

" . . . All parties understood that the appointment of a conservator or receiver is a drastic and extraordinary action, to be used only as a last resort. Obviously they knew that the mere fact of the appointment, when announced, and by the manner and wording of the announcement, creates uncertainty and panic among depositors. Inevitably there is a 'run' on the association, millions of dollars in deposits are hastily withdrawn, assets are depleted.

"The Board anticipated the 'run' on Long Beach Federal and prepared for it by arranging for a loan of \$30 million from the Insurance Corporation at 4 percent interest. Thus, Long Beach Federal was put in debt to the Insurance Corporation for that huge amount to handle a situation created not by its own managerial decision but by the seizure action of the Board. Chairman Robertson said it was only 'prudent' to anticipate and plan for the run.

"The local association suffers rather than improves under the management of a Federal official who is a stranger to the community, who has but a temporary and transient and

punitive-type connection with the local association, and who has no incentive or instructions to build up the association's business. In fact, the supervisory representative conducts a holding operation 'pending' -- to use the Board's phrase in its recent order -- 'further disposition of said association and its affairs.'

" . . .

"(9) A better explanation of the summary seizure action was the Board's unwillingness to permit Long Beach Federal to convert from a Federal to a State-chartered association, which conversion is permitted by law. The seizure order came on the heels of an application by Long Beach Federal to the California State authorities for conversion and a subsequent examination by State examiners, which was interrupted by the seizure action.

"(10) The Board contemplated, when it directed the seizure, that there would be a 'run' on the association by depositors, and it arranged in advance for a \$30 million loan by the Insurance Corporation to the association. At the time of the hearings, 6 weeks after seizure action, approximately \$37 million had been withdrawn from the \$96 million association.

" . . .

"(1) The Board should restore forthwith Long Beach Federal to its former management.

" . . .

"(4) In effecting the return of Long Beach Federal to its former management, the Board should utilize the financial and credit resources of the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank of San Francisco to enable the association to repair the damage done by the seizure and to regain its previous business position." (Emphasis added).

The \$30,000,000 loan of 1960 grew to \$47,000,000 and the \$35,000,000 run grew to \$69,000,000 of withdrawals by 1962. ^{33/}

Can there be any doubt of the desperate need of Long Beach Federal in 1962 for the tens of millions of dollars of new savings deposits it so urgently sought from every possible source? Appellee Long Beach Federal ran daily full page ads in local and other newspapers. It also broadcast over television, radio, etc., seeking millions in new savings deposits in every way. (Copies of such ads are plaintiff's exhibit 12 B) Yet, appellants would forfeit and penalize these new depositors.

A Bank Board capable of these injustices could be expected to label as "pickpockets" ^{34/} and try to forfeit those new savings depositors who came to the aid of Long Beach Federal in April 1962 when it sorely needed tens of millions of dollars of new deposits to recover from the \$69,000,000 run and seizure of 1960-1962.

^{33/} From First Report of Special Home Loan Bank Board Committee on its investigation of Federal Home Loan Bank Board seizure of Long Beach Federal Savings and Loan Association. Appendix III hereof.

^{34/} Appellants counsel at TR-122 referred to the new savings depositors as "pickpockets". He later withdrew such epithet, but it discloses the attitude of appellants and their counsel.

In Farmers v. United Electrical, etc., 211 F. 2d 36 (CA-DC, 1953), [Cert. Denied 347 U.S. 943, 98 L.ed. 1091], the N.L.R.B. denied all members of a labor union all their rights under the Labor Act. Such denial was solely because the Union's officers had not complied with a Board order. The D.C. Court of Appeals said at page 39:

" . . . To impose this penalty upon the great mass of innocent union members is as reckless as firing a shotgun into a crowd of people in an attempt to stop one who is picking their pockets."

VI.

PLEDGING A SAVINGS ACCOUNT TO SECURE A LOAN IS NO
CRIME OR WRONG. IT CANNOT BE USED AS AN EXCUSE TO
FORFEIT ANY PART OF THE PLEDGED SAVINGS ACCOUNT.

The power of the Bank Board to prevent fraud, crime or violation of any law or regulation, is unquestioned. But neither fraud, crime, or any wrong is here involved in any way. Fraud or crime are never presumed. They must be specifically alleged and proved. None of appellant Bank Board's forfeiture orders ^{35/} contain any findings (or even accusations) of any fraud or wrong. ^{36/} Nor was any proof thereof offered to the trial court. Instead forfeitures were inflicted by appellants mere fiat or whim.

It is not fraud or a crime to pledge or assign a savings account in a Federal savings and loan association. No published regulation or ruling of the Board places any penalty upon so pledging or assigning. On the contrary, pledging or assigning are specifically authorized. For about 30 years Long Beach Federal's Charter ^{37/} has read:

"13. Loans and investments.--The association may make loans to holders of share accounts on the sole security of their share accounts. To secure such loans the association shall obtain a lien

^{35/} Appellants' Orders are Plaintiff's Exhibit 3-D-4 and 3-D-5.

^{36/} See section VI-A, page 77 hereof entitled "Appellants Made No Findings Of Any Fraud, Crime or Wrongdoing By Anyone".

^{37/} Said Charter is Plaintiff's Exhibit 19.

upon, or a pledge of, the share account. . ."

This Charter form was drawn by the Bank Board and issued to Long Beach Federal on April 13, 1937. It has never since been changed.

Many Bank Board regulations provide how a savings account is to be pledged or assigned. Examples are:

12 C.F.R. 545.7 reads in part:

"§545.7 Loans on savings accounts.

"Any Federal association may make loans on the security of its savings accounts, whether or not the borrower is the owner of such account: Provided, That the association obtains a lien upon, or a pledge of such savings account as security therefor. . . ." [emphasis added]

The form of savings passbook issued to every savings depositor is determined by appellant Bank Board. 12 C.F.R. 545.2 reads in part:

"§ 545.2 Evidence of ownership.

". . .

"(b) Account books and certificates. A Federal association that has Charter N or Charter K (rev.) shall issue to each holder of its savings accounts an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association; except as hereinafter provided, each such certificate shall be in form prescribed by the Board. (The Board has prescribed for use by all Federal associations that have Charter K, forms of certificates evidencing the ownership of savings share accounts, short-term savings share accounts, and investment share accounts; and has prescribed for use by all Federal associations that have Charter N or Charter K (rev.) forms of certificates evidencing ownership of savings accounts. Illustrative copies of these forms may be obtained from the Federal Home Loan Bank Board, Washington, D. C., or from any

Federal home loan bank.) . . .

"(c) Ownership of record. A Federal association may treat the holder of record of a savings account as the owner for all purposes without being affected by any notice to the contrary unless such Federal association has acknowledged in writing notice of a pledge of such savings account. . . . [Emphasis added]

"(d) Duplicate account books and certificates. Upon filing with a Federal association by the holder of record as shown by the books of the association, or by his legal representative, of an affidavit to the effect that the certificate or account book evidencing his savings account with the association has been lost or destroyed, and that such certificate or account book has not been pledged or assigned in whole or in part, such Federal association shall issue a new certificate or account book evidencing such savings account in the name of the holder of record:" [Emphasis added]

12 C.F.R. 561.5 reads in part:

"§561.5 Account of an insured member.

"An 'account of an insured member' is the total amount credited . . . to any member in withdrawable or repurchasable accounts, whether or not such accounts are subject to any pledge." [Emphasis added]

Every passbook issued to Long Beach Federal's 60,000 depositors contains a blank form for assignment.^{38/}

This form was supplied by appellant Bank Board to Long Beach Federal for its use.

Thousands of these passbooks were issued in this exact form to Long Beach Federal depositors by appellant Bank Board's

^{38/} Such form is:

"TRANSFER OF SHARE ACCOUNT AND MEMBERSHIP

"For value received the undersigned hereby sells, assigns and transfers to _____ the share account represented by the within certificate of LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION and does hereby irrevocably constitute and appoint the officers of said association to transfer said share account on the books of said association.

"This ____ day of _____, 19__

"Signature* _____

"In the presence of: _____

"The undersigned is the transferee of the share account represented by the within certificate and has executed application for membership and signature card.

"Signature* _____

"Transfer entered of record _____, 19__

"LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION

"By _____

"*Note: Co-tenants (with right of survivorship) are one member as a partnership is one member. One signature is binding."

(Plaintiffs Exhibit 16)

own employees.

Supervisory Representatives in Charge Ault and Stone seized Long Beach Federal and operated it for two years (1960 to 1962). Conservator Ammann seized Long Beach Federal and operated it for another two years (1946 to 1948). All three (Ault, Stone and Ammann) for said four years took millions of dollars of savings depositors' money from thousands of savings depositors and issued to them this identical form of passbook containing this exact form for assignment.

Many of these regulations have existed 20-25 or 30 years. All were effective in 1962 when these savings accounts were pledged or assigned. Even today (1966) four years later, all these regulations remain unchanged and fully effective.

Yet appellant Federal Home Loan Bank Board by its forfeiture seeks to forfeit all pledged or assigned savings accounts regardless of size or duration.

VI-A.

APPELLANTS MADE NO FINDINGS OF ANY FRAUD,
CRIME, OR WRONGDOING BY ANYONE ^{39/}

Appellant Bank Board has made 3 board orders on the Long Beach Federal-Equitable merger. They are orders No. 17177, FSLIC-1593 and No. 17374. ^{40/} These orders comprise about 9 pages of single space, small type. They were made in June and September 1963.

Thousands of pages of photocopies of savings accounts records were made by Long Beach Federal and sent appellant Bank Board. Hundreds of letters were exchanged between Board and Long Beach Federal. [Plaintiff's Exhibit "21", Defendant's Exhibit "C".]

Many conferences between Board members and Long Beach Federal officers lasted three consecutive days.

In 1963 Congress demanded and the Board gave reports on this long delay. [Plaintiff's Exhibit "22", pgs. 38-44.] The Board took over a year considering the matter. (May 1962 to June 1963.)

Yet no fraud, no wrong, no violation of any law or regulation is anywhere found or stated in any Bank Board order

^{39/} See also section IX, page 27 hereof entitled "Whatever May Be The Power Of The Board Based Upon Findings Of Fact It Cannot Forfeit Plaintiff's Savings Deposits By Mere Edict Or Fiat Issued After The Deposits Were Made".
^{40/} Plaintiff's Exhibit 3-D-4 and 5.

on this merger.

Instead the Board simply forfeits the Charter rights of all pledged or assigned savings accounts to share in the association's surplus. This forfeiture is regardless of size of the savings account. It wipes out the \$1.00 accounts as well as the \$100,000 or larger accounts.

The Bank Board pretends to "protect the small depositor". But, of the about 1,899 savings accounts forfeited by appellant Board:

- (a) Over 300 or 17% are \$500 or under each;
- (b) Over 1,520 or 80% are \$11,000 or under each; and
- (c) Only 54 or 3% are \$100,00 or over each.

[Plaintiff's Exhibit "13"; District

Court Opinion 233 F. Supp. 578 at page 599]

The Board actually takes away the share of the poor savings depositor who must pledge or assign his savings account and gives it to the more fortunate depositor whose account remains unpledged.

By the Board's forfeiture orders, unpledged savings accounts up to \$10,000 each take their own full share of the Association's surplus; they also take the shares of all pledged or assigned accounts. Thus the small depositor who must pledge or assign his savings account to secure his debts loses his share of the surplus. It is taken from him and given to other more fortunate savings depositors who do not need to give security in

order to borrow. The small depositors only crime is that he gave his savings account as security for his debt. For this his share of the Association's surplus is taken from him and given to others -- others who may have borrowed more than he did but who did not pledge or assign their savings accounts as security.

The unfairness of this arbitrary discrimination is emphasized by the fact that several savings accounts of \$10,000 each are often held by the same family. Father may have his own \$10,000 account, mother may have her own \$10,000 account, father and mother may have their joint \$10,000 account. Any number of sons or daughters may each have their own separate \$10,000 accounts. Minor children's accounts are often held for them by their parents as guardians or trustees. This may be extended to as many separate accounts as there are members of large families. As an example:

Account Number	Name	Balance
1	John Smith	\$10,000 or less
2	Mary Smith	\$10,000 " "
3	John Smith and Mary Smith	\$10,000 " "
4	John Smith, as Trustee for Mary Smith	\$10,000 " "
5	Mary Smith, as Trustee for John Smith	\$10,000 " "
6	John Smith, as Trustee for John Smith, Jr. (His Son)	\$10,000 " "
7	Mary Smith, as Trustee for John Smith, Jr. (Her Son)	\$10,000 " "

Account Number	Name	Balance
8	John Smith and Mary Smith, as Joint Trustees for John Smith, Jr. (Their Son)	\$10,000 or less
9	Mary Smith, as Trustee for Mary Ann Smith (Her Daughter)	\$10,000 " "
10	John Smith, as Trustee for Mary Ann Smith (His Daughter)	\$10,000 " "
11	John Smith and Sam Smith (John's Father)	\$10,000 " "
12	Mary Smith and Helen Jones (Mary's Mother)	\$10,000 " "
Total		\$120,000 ^{over} \$10,000

The total savings accounts of one family can thus easily exceed \$100,000.^{41/} But so long as no single account

^{41/} Such splitting of accounts into \$10,000 each is encouraged by both Congress and the Bank Board. 12 U.S.C. §1724, as amended by Congress in 1959 reads in part:

"SUBCHAPTER IV.--INSURANCE OF SAVINGS AND
LOAN ACCOUNTS

"§ 1724. Definitions

"As used in this subchapter--

* * * * *

"(b) The term 'insured member' means an individual, partnership, association, or corporation which holds an insured account. . . . Funds held in fiduciary capacity, when invested in an insured institution shall be insured in an amount not to exceed \$10,000 for each trust estate, and notwithstanding any other provisions of this chapter, such insurance shall be separate from and additional to that covering other investments by the owners of such trust funds or the beneficiaries of such trust estates. Notwithstanding

exceeds \$10,000, the entire \$100,000 will take its equal pro rata share of the Association's surplus. After the merger this amounted to about \$1,300 per \$10,000 account, or a total of \$13,000 for the \$100,000 family. [Plaintiff's Exhibit 12/9/63-2, 12/9/63-3]

The \$500 account holders' share was about \$65.

The \$1,000 account holders' share was about \$130.

The \$5,000 account holders' share was about \$650.

By the Bank Board's forfeiture orders the \$100,000 family gets its own \$13,000 pro rata share. It also takes:

41/ cont'd:

any other provision of law, two persons who are husband and wife shall have, with respect to accounts in an insured institution which are community property of such husband and wife and to the extent that such accounts are community property, not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of the husband, not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of the wife, and not to exceed \$10,000 of insurance with respect to such an account or accounts in the sole name of both: Provided, That in no event shall this sentence increase to an amount which is greater than the total of the amounts hereinbefore set forth in this sentence the aggregate of the insurance which such husband and wife may have under this sub-chapter with respect to (1) any account or accounts in such institution in the sole name of either of them or in the sole names of both, and (2) any other account or accounts in such institution to the extent that such other account or accounts would, in the absence of this sentence, be required to be included in determining the amount of the individual insurance of such husband or of such wife under subsection (a) of section 1723 of this title. As amended July 28, 1959 . . ."

NOTE: In 1966 the amounts of said insurance was increased by Congress from \$10,000 to \$15,000.

(a) All the shares of \$500 accounts (or less) \$65.00 per account;

(b) All the shares of \$1,000 accounts (or less) \$130 per account; and

(c) All the shares of \$5,000 accounts (or less) \$650 per account (and all other pledged or assigned accounts shares).

Appellants contend and appellees admit many large depositors borrowed the money from other banks to make their savings deposits in Long Beach Federal. Some, but not all of these Long Beach Federal depositors pledged or assigned their savings passbook to the bank as security for said bank loans. But others borrowed from banks to make their deposits, yet did not pledge their Long Beach savings accounts as security for their bank loans.

Under appellant Bank Board's forfeiture orders they would receive their own pro rata share of the association's surplus and also take the shares forfeited by all those who pledged or assigned.

Thus, the \$100,000 family could have borrowed all its \$100,000 from a bank, split it up into 10 Long Beach Federal savings accounts of \$10,000 each, and (so long as it did not pledge its accounts) yet receive both its own \$13,000 pro rata share of the surplus and also get the \$65 forfeited share of the \$500 savings account holder compelled by his poverty to pledge or assign his \$500 savings account as security for his debt.

There can be no possible justification for taking the \$500 savings depositors tiny \$65 share of the Association's surplus from him to add it to the \$13,000 share of the \$100,000 family who may also have borrowed all the money they deposited. Yet the Bank Board's forfeiture orders do just that.

Congress created MUTUAL Federal savings and loan associations to encourage, not penalize, savings thrift and borrowing. 12 U.S.C. §1464(a) reads:

"§1464. Federal Savings and Loan Associations -- Organization authorized

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." [Emphasis added]

Mutuality is destroyed and the act of Congress repealed by such Bank Board orders.

VII.

HAVING MORE THAN \$10,000 IN A SINGLE
SAVINGS ACCOUNT IS NO CRIME OR WRONG.

IT CANNOT BE USED AS AN EXCUSE TO
FORFEIT ANY PART OF SAID ACCOUNT

Even more shocking is the Bank Board's discrimination against savings depositors because of the size of individual savings accounts. It is neither fraud or a crime to have more than \$10,000 in a single savings account in a Federal savings association. No published regulation or ruling of the Board places any penalty upon the size of any such savings account, whether under or over \$10,000 each. ^{42/}

Yet by its forfeiture orders the Bank Board takes away the shares of Long Beach Federal's surplus from all accounts over \$10,000 each and gives the forfeited shares to all accounts of \$10,000 or less. The gross unfairness of this is made most apparent by contrast. For example, two families make savings deposits of \$100,000 each in Long Beach Federal on the same day. One splits its \$100,000 up among father and mother, sons and daughters, grandparents, etc. It opens 10 separate savings accounts of \$10,000 each with 10 separate account numbers and 10

^{42/} 31.4% or almost one-third of all the savings accounts of all the savings and loan associations throughout the United States are held in accounts of more than \$10,000 each. See page 124 hereof for details.

separate savings passbooks. Its pro rata share of Long Beach Federal's surplus after merger is \$13,000 (\$1,300 for each of the 10 accounts).

On the same day another family also makes a \$100,000 deposit. It opens only a single account for \$100,000 in the name of the father. It has a single savings passbook and only one account number. Its pro rata share of Long Beach Federal's surplus is also \$13,000. There is \$26,000 of surplus for both families. By the applicable act of Congress (12 U.S.C. 1464 (1)) and Long Beach Federal's charter each would get its pro rata \$13,000.

By both law and reason both families should be treated exactly alike and get \$13,000 each. But by the Bank Board's arbitrary forfeiture orders the split account family takes \$17,900 and the single account family takes \$1,300. The split account family gets about 13 times more than the single account family. Yet both have the same amount \$100,000 on deposit.

This absurd distribution results from the Bank Board's "formula" distribution instead of equal and pro rata statutory and charter distribution. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

" . . . in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits." . . ."
[Emphasis added]

The Bank Board orders require each unpledged and unassigned savings account to receive its pro rata share of surplus up to \$10,000 per account but no more. Thus the single account family participates for only \$10,000 of its \$100,000. It gets \$1,300 for the first \$10,000 of its account and no more. It loses \$11,700 on the excluded \$90,000 balance in its \$100,000 account.

The \$11,700 thus lost is taken from the single account family and scattered at random among all accounts under \$10,000 each.

The split account family gets its own \$13,000. It also gets about \$4,900 of the forfeited amount taken from the single account. The balance is scattered among other yet smaller accounts.

But all accounts large and small are excluded to the extent they are pledged or assigned.

VIII.

APPELLANT BANK BOARD FORFEITS SMALL DEPOSITORS INSTEAD OF PROTECTING THEM

This double barreled exclusion creates a shot gun blast which mows down the very depositors the Bank Board says it is "protecting".

As shown above the \$500 and \$1,000 depositors compelled by dire necessity to pledge or assign their tiny savings accounts to secure their debts, lose. They lose their \$65 to \$130 shares of the Association's surplus. And they lose it to other depositors who may have borrowed even more but who did not secure their debt with their savings passbooks.

Two families open identical savings accounts the same day in the same amounts, i.e. \$100,000 each. Both should receive \$13,000 each for their respective pro rata shares of the Association's surplus. The surplus was created by both families equally.

One splits its deposits into 10 separate accounts totalling \$100,000. The other makes a single deposit of \$100,000 with a single savings account.

By the Bank Board's capricious orders of distribution the split account family will get \$17,900 for its \$100,000. The single account family will get only \$1,300 for its \$100,000. One gets \$16,600 more, 13 times more than the other. Yet both deposited identical amounts on the same day.

If any distinction were to be made it should favor and

not exclude the \$100,000 single account family. The 10 accounts of \$10,000 each were each fully insured for a total of \$100,000 by appellant Federal Savings and Loan Insurance Corporation.

The single account of \$100,000 was insured for only \$10,000. \$90,000 or 90% of it was exposed to further Bank Board seizures and possible depositors runs resulting in perhaps another 20 years of court litigation. Yet, the \$100,000 single account which took these heavy risks is to get only \$1,300 and the identical \$100,000 in split accounts which were fully insured and took no risks are to get \$17,900.

13 times more for one than the other.

Why do hundreds of \$500 depositors lose their \$65 (each) share of the Association's surplus to other depositors whose shares are \$1,300 (each) or more?

Why does one savings depositor get \$17,900 and another get \$1,300 (or 13 times less) for his share of the Long Beach Federal surplus when both deposit the same amount in similar savings accounts on the same day in the same Federal savings association?

Why? Because appellant Bank Board says so. That's why. And the Bank Board says so only a year or more after the deposits are made. No published law, regulation or ruling authorizes any distribution other than equally and pro rata in proportion to the savings accounts balances. Such is in the teeth of the applicable Act of Congress and contradictory of its plain terms which require:

". . . in the event of dissolution after

conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits. . . ."
[Emphasis added]

(12 U.S.C. 1464(i); 233 F. Supp. 578 at 592, Appx. I-a hereof.)

25 years before the deposits were made the Bank Board signed Long Beach Federal's charter. It follows the Act of Congress. The charter says:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Plaintiff's Exhibit "19" pg. 6]

Six weeks before the deposits were made appellant Bank Board signed the Settlement Agreement ^{43/} (February 14, 1962) with the Long Beach Federal and with the Shareholders' Protective Committee. The Settlement Agreement, Article XV also provided for distribution of Long Beach Federal's surplus equally and pro rata. It said (page 45):

"(h) After the assumption by Equitable of said aggregate principal amount of all Long Beach share accounts and after the payment or the making by Long Beach of provision for payment of all creditor and other liabilities, the net surplus, reserves and undivided profits of Long Beach shall be distributed as and when available to Long Beach shareholders . . .

"(i) Each such shareholder shall be entitled to such part of the amount of such distribution as

the dollar value in principal of his share account at the close of business on Approval Day bears to the total dollar value in principal of all Long Beach share accounts at the same time (not including said adjusting dividends in the computation) . . .

"(ii) Such distribution shall be made from time to time, . . . until the total net surplus, reserves and undivided profits and any other remaining assets of Long Beach have been collected, converted into cash and distributed according to such plan."

This was in the exact terms of both Long Beach Federal's charter and the Act of Congress 12 U.S.C. §1464(i) (see page 42 hereof for text). Any other unequal or preferential distribution violates the U. S. Constitution, the Act of Congress and Long Beach Federal's charter.

The Settlement Agreement was filed with both State and Federal Courts. By orders of both said courts, notices were published and were also mailed to all Long Beach members, including those who withdrew during the \$69,000,000 run. The notices referred to the settlement. Both State and Federal courts and a Bank Board member were in Long Beach Federal's premises on April 2, 1962 when this Settlement Agreement was approved by both courts then holding court sessions with their clerks and court reporters in Long Beach Federal's offices. [3R-1145] Long Beach Federal was then returned to its founding management. About \$24,000,000 of new deposits were made that day and the next. Within a few weeks the deposits had increased more than \$35,000,000.

But when Long Beach Federal sought to distribute its surplus according to the exact terms of the Settlement Agreement,

the Act of Congress (12 U. S.C. §1464(i)) and Long Beach Federal's charter, the Bank Board says "No". "The Act of Congress and the charter are wrong". There must be a distribution by "formula". Thousands of savings depositors must be excluded entirely. Other thousands shall take their own shares and also the shares of those excluded. Among hundreds of savings depositors who deposited the same amounts on the same day in the same savings association, some shall be preferred; others shall be excluded. Some shall receive distributions of 13 times more than others. Those favored by appellant Board shall take all. Those hated by appellant Board shall take nothing.

Appellant Bank Board fancies itself as a sort of Robin Hood, taking from the "rich" and giving to the poor. But in this also, the "Robin Hood" Board has become confused.

The "rich" from who it takes include hundreds of \$500 and \$1,000 savings account holders who pledged their tiny savings accounts to secure their small but pressing debts. Is a savings depositor who must pledge or assign his \$500 or \$1,000 savings account rich? Yet, appellant Bank Board says he must lose his \$65 or \$130 share of the association's surplus.

The "poor" to whom appellant Bank Board "gives" include all savings depositors whose accounts are less than \$10,000 each and are unpledged and unassigned. A series of such \$10,000 accounts in a single family often exceeds \$50,000 to \$100,000 per family. Is a family with \$50,000 or \$100,000 in unpledged savings deposits poor? Yet, they will get the \$65 taken by the Bank Board

from the \$500 depositor who pledged or assigned his savings account to secure his debt.

The \$65 of surplus so taken from the "rich" will be added to increase the \$13,00 share of surplus going to the "poor".

The "rich" who has only \$500 (and that pledged for his debts) loses his \$65 to increase the \$13,000 share of the "poor" who has \$100,000 of savings deposits free and clear of any pledge.

For this result the Bank Board sets aside the Act of Congress (12 U.S.C. §1464(1)), Long Beach Federal's charter and the Settlement Agreement; so as to obtain the Board's ideas of "fair and equitable".

This is not the insanity it might appear to be. The Bank Board hoped to split Long Beach Federal's savings depositors into factions and set these factions at war with each other. If this took place no merger could be made. This is the same Bank Board whose predecessors twice seized this same Long Beach Federal on ex parte charges of "unsafe and unsound" management. Twice this same Bank Board caused disastrous runs of withdrawals. In 1946 over \$10,000,000 (about 1/2) was so withdrawn out of \$22,000,000 of then savings deposits. In 1960 \$69,000,000 (more than 70%) was withdrawn out of \$96,000,000 then savings deposits. [3R-1125-1130]

Twice the appellant Bank Board administration was investigated and its seizures and destruction condemned by Congressional Committees, in 1946 and again in 1960.^{44/} A third

^{44/} See page 42-44 hereof for details of Congressional Committee reports.

seizure threatened in 1949 was blocked by a Federal Court injunction [14 F.R.D. 273]. A third Congressional investigation in 1950-1952 resulted in Congressional amendments to the United States laws [12 U.S.C. 1464d as amended in 1954]. The amendments made the appellant Bank Board liable to suits in the local United States District Courts where the seized savings and loan association is located.

Twice this same Bank Board withdrew its phony charges and returned the seized Long Beach Federal to the same management from which it has been seized. [3R 1125-1130]

A Shareholders' (depositors) Protective Committee was formed. It sued the Bank Board in 1946 and again in 1960. To settle these damage and accounting suits pending against it appellant Bank Board (through the Federal Savings and Loan Insurance Corporation) in 1962 paid over \$5,000,000 as damages to the seized Long Beach Federal. Such damage payments were recommended by the Congressional investigating committees^{45/} and approved by both State and Federal Courts. [Plaintiff's Exhibit "10-A", pg. 21]

No "presumption of correctness" can apply to any actions of this appellant Bank Board with this dismal record. A Bank Board that twice seizes and almost destroys a \$100,000,000 Federal savings association only to twice return it to the very same management must be presumed to be equally wrong when it abrogates

^{45/} See page 69-70 hereof for quotation of Committee recommendation.

the restored Association's charter. At best appellant Board was mistaken and inept. At worst malicious and punitive.

But whether by accident or by design, in 1963 the Bank Board again fired its blunderbuss into the crowd of 60,000 Long Beach Federal savings depositors. The Bank Board in 1964 said to the trial court that in 1962 it saw "pickpockets" scattered among the depositors and that it must "protect" the "small depositors" against them. [Tr. 122] Hence the blast from the blunderbuss.

How a \$500 savings depositor is "protected" by the Board forfeiting his \$65 share of Long Beach Federal's surplus is a mystery; especially when it is forfeited to a group of savings depositors whose accounts are up to \$10,000 each and whose share of the surplus is at least \$1,300 each.

But in 1946 and in 1960 the predecessors of this same Board saw "unsafe and unsound management" in charge of Long Beach Federal and seized Long Beach Federal to "protect it". [3R-1125-1130]

In 1948 and again in 1962 this same Board returned the seized Association to the very same "unsafe and unsound management" [3R 1125-1130] from which it was seized.

Again in 1949 yet a third seizure was threatened but stopped by the trial court's injunction [14 F.R.D. 273]. When the 1949 injunction was dissolved in 1953, the same "unsafe and unsound" management was still left in Long Beach Federal by the Bank Board for 7 years more until the 1960 seizure [189 F. Supp. 589].

In 1962 this same Board paid Long Beach Federal over \$5,000,000 to settle damage suits for its prior seizures. [3R 1140-1141] This \$5,000,000 was paid to the very same "unsafe and unsound" management from which Long Beach Federal was twice seized and threatened with a third seizure.

If, as the Board claims, it saw "pickpockets" among Long Beach Federal's depositors, why did the Board resist all the Long Beach Federal's many months of efforts to bring such matters before the Federal Courts?

Long Beach Federal repeatedly in 1962-1963 asked appellant Bank Board to be allowed to complete the merger and then let the Court decide how Long Beach Federal's surplus should be divided among its 60,000 depositors. For almost a year from the summer of 1962 until June of 1963, the Board refused. [Plaintiff's Exhibit "21"- "16", pg. 4] On April 27th, 1963 Long Beach Federal's depositors held a mass meeting in the Long Beach municipal auditorium. Among the resolutions unanimously passed were:

(1) A resolution thanking the large depositors for coming to the aid of the Association when it was restored in 1962 after the disastrous \$69,000,000 run^{46/}; and

(2) Another resolution asking the United States

Congress to again help the damaged Association to merge with Equitable as the Bank Board had agreed in the February 1962 Settlement Agreement.

(Said resolutions are part of plaintiff's Exhibit 7-A 2-7). The shareholders' meeting was recessed.

IX.

WHATEVER MAY BE THE POWER OF THE BOARD
BASED UPON FINDINGS OF FACT IT CANNOT
FORFEIT PLAINTIFF'S SAVINGS DEPOSITS BY
MERE EDICT OR FIAT ISSUED AFTER THE
DEPOSITS WERE MADE.

There is nothing illegal or inherently wrong because savings deposits exceed \$10,000 each, or because savings accounts regardless of size are pledged or assigned.

There is no prohibition in either statutes or regulations in any way restricting the size of savings accounts either singly or in combinations. Nor is there any prohibition against pledging or assigning any savings account big or little.

Instead, both statutes and regulations expressly recognize and provide for both accounts over \$10,000 each and for pledging or assigning savings accounts regardless of size. 47/

The only findings made by the Bank Board are in its order No. 17177 [Pls. Exh. 3-D-4]. The Bank Board says:

" . . . The Federal Home Loan Bank Board has determined that . . . said Merger Agreement . . . is advisable and in the interest of all concerned; and that the distribution of the 791,650 shares of guarantee stock of Equitable Savings and Loan Association to the shareholder members of Long Beach Federal Savings and Loan Association in the manner specified in Articles VII and VIII of said

Merger Agreement is fair and equitable;"

These generalities do not even glitter. Instead they deceive and delude. Defendants Bank Board, et al., admit that they take 205,829 shares of Equitable stock, about \$2,500,000 ^{48/}, from thousands of Long Beach Federal depositors. They are those who have borrowed or pledged their savings accounts regardless of size and those whose accounts exceed \$10,000 each.

Appellants' findings that such a forfeiture is "advisable and in the interests of all concerned" and is "fair and equitable" contain no statement of any basis for confiscation of the statutory [12 U.S.C. 1464 (i)] and charter rights and ownership of the excluded Long Beach Federal depositors. They contain no finding nor even an accusation of any crime or wrong which would authorize forfeiture.

Such are not findings. They are not even conclusions. For it certainly cannot be "in the interests" of those who lose, for \$2,500,000 ^{48/} to be taken from them who are wholly excluded and given to another group which are thereby preferred.

For it to be "fair and equitable" to thus prefer one and exclude others, some basis or justification must be shown by the findings for such punitive and confiscatory action. To merely say it is "fair and equitable" or it is "advisable" or is "in the interests of all concerned" is not enough to condemn the owner to forfeiture of his property.

If there is any basis for denying all depositors who have pledged or assigned their accounts, their charter pro rata share of the surplus of their mutual association, such basis must be stated explicitly and understandably in the Bank Board's findings. If there is any justification in law or fact for all savings accounts in excess of \$10,000 each to forfeit their statutory and charter rights to their pro rata share of the Association's surplus, that also must be plainly and clearly stated in the findings.

Absent such statements or findings, the Bank Board's orders are confiscation pure and simple. They also are unconstitutional.

If there were any facts or reasons justifying the exclusions and forfeitures inflicted by the Bank Board, those facts must be stated and found.

Suspicion and rumor are not enough. But the Bank Board's orders do not even contain that. They contain no accusations and no findings. No basis is stated in any order. Instead, the orders just penalize, forfeit and exclude.

Such is contrary to every concept of constitutional law and many Supreme Court decisions.

In Securities and Exchange Com. v. Chenery Corp., 37 L.ed 626, 318 U.S. 80 (U.S. Supreme Court - 1942) officers, directors and majority stockholders bought on the open market stock in their own company. These purchases were made during the pendency of reorganization proceedings before the S.E.C.

The S.E.C. refused to approve the reorganization unless the majority stockholders surrendered their stock for cancellation. The stockholders sued, the Court of Appeals set aside the forfeiture order and the U. S. Supreme Court affirmed, saying at page 635-637 L.ed., 92-95 U.S.:

" . . . But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards -- either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11 (e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commissioner.

" . . .

" . . . Its action must be measured by what the Commission did, not by what it might have done. . . . The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . . [citing authority] There is no such finding here." [Emphasis added]

In the second Chenery case, 91 L.ed 1995, 332 U.S. 194, the Court cites and approves the above principles of law and said

at L.ed page 1999-2000, U.S. p. 196-199:

" . . . a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . .

" . . . If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; . . ."

In Anglo-Canadian Shipping Co. Ltd. v. Federal Maritime

Com'n. 310 F.2d 606 (1962), this Court of Appeals for the Ninth Circuit invalidated Federal Maritime Commission orders made upon findings similar to those of the Bank Board in our case. The Maritime Commission had found that agreements to pay less than the specified rate of brokerage "operate to the detriment of the commerce of the United States, and are contrary to the public interest," [p. 607]. Just as in our case there is no law or regulation authorizing a forfeiture of savings accounts in excess of \$10,000 each, or which are assigned or pledged, this Court said at page 609:

" . . . there is no law, rule or regulation which requires an individual carrier to pay brokerage to any one."

This Court held the quoted "finding" wholly inadequate and the order based thereon void, and said at pages 613-617:

" . . . As the Supreme Court has said in matters calling for administrative determinations similar to this one: 'There must be a

full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.' *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1283. . . . Not only was there a want of hearing and evidence, but also a complete failure on the part of the Commission to conform to the requirements of § 8(b) of the Administrative Procedure Act, (Title 5 § 1007(b)), whereby parties are afforded an opportunity to propose findings and to note exceptions to decisions or recommended decisions. . . . 'The Administrative Procedure Act requires all decisions to state not only findings and conclusions, but also "the reasons or basis therefore, upon all the material issues of fact, law or discretion presented on the record * * *," Section 8(b) 5 U.S.C.A., Section 1007(b). The Board 'should make the basis of its action reasonably clear.' . . . [citing authorities]

" . . .

" . . . there is no exception to the requirement of § 8(b) for findings sufficient to support the Commission's order. Those findings are completely lacking in this record. The cases holding that such findings are essential in an administrative proceeding such as this are legion.³ The general conclusion stated in the Board's final order and supplemental report, phrased in the language of the statute, does not conform to the requirements of the Administrative Procedure Act, nor does it satisfy the rule respecting the necessity of findings. The requirement of specific, definite and basic findings, other than mere ultimate findings or conclusions, is well settled. Thus in *Florida v. United States*, 282 U.S. 194, 213, 51 S.Ct. 119, 124, 75 L.Ed. 291, the Court said: ' . . . This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient . . . '.

" . . . in *Colorado-Wyoming Co. v. Comm'n*, 324 U.S. 626, 634, 65 S.Ct. 850, 854, 89 L.Ed. 1235, the Court said: 'But we must first know what the "finding" is before we can give it that conclusive weight. We have repeatedly emphasized the need for

³ Many of them are collected in Davis, *Administrative Law Treatise*, Chap. 16, §§ 16.01 to 16.14.

clarity and completeness in the basic or essential findings on which administrative orders rest,' citing the Florida and other cases."

". . . What this involves was spelled out in clear language in *Saginaw Broadcasting Co. v. Federal C. Com'n.* 68 App.D.C. 282, 96 F.2d 554, 559. There after noting the necessity for findings of fact by administrative boards, and Commissions, and the reasons for that requirement, the court said: 'In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basis or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion.¹⁵ See also *United States v. Chicago, M. St. P. & P.R. Co.*, 294 U.S. 499, 510, 55 S.Ct. 462, 79 L. Ed. 1023.

". . .

"[3] As noted in the *Saginaw* case, 96 F.2d at p. 563, the absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings. . . ."

"5. This case is discussed in a note on 'Necessity, form, and contents of express finding of fact to support administrative determinations' in 146 A.L.R. 209, at pp. 220, ff., where it is referred to as a leading case."

In *State of New York v. United States of America*, 96 L. ed 662, 342 U.S. 882 (U.S. Supreme Court - 1951) the Supreme Court was considering administrative action made without adequate findings. Mr. Justice Douglas dissented and said at L.ed page 663, U.S. page 883-884:

"We have here no finding as to the necessary relation between interstate and intrastate commutation rates. . . .

"Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal." [Emphasis added]

It is cited because the dissent of 13 years ago has been repeatedly cited and quoted including Davis on Administrative Law, Volume 2, Paragraph 16.05, page 447 and by the Supreme Court of California in California Motor Transport Co. v. Public Utilities Com., 59 C. 2d 270 (1963) at 274.

In California Motor Transport Co. v. Public Utilities Com., the California Supreme Court reversed the Public Utilities Commission for findings, almost identical with those made by the Bank Board in our case. The California Supreme Court said at pages 274-275:

". . . The ultimate finding of public convenience and necessity is so general that without more, a reviewing court can only guess at how it was reached. [Citing authorities]

". . .

"Findings on material issues can also serve to help the commission avoid careless or arbitrary action. [Citing authorities] . . . There is no assurance that an administrative agency has made a reasoned analysis if it need state only the ultimate finding of public convenience and necessity . . ."

In Coffey v. Jordan, 275 F. 2d 1 (U.S.C.A.-Dist. of Columbia - 1959) the District of Columbia Superintendent of

Insurance suspended the license of an insurance broker because of an alleged misconduct. The District of Columbia Court of Appeals reversed and said at page 2:

"We think the District Court erred. Although § 35--426, under which appellee acted, contains no express requirement for findings, 'the practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement.' . . ."

Citing many authorities including Securities and Exchange Com. v. Chenery Corp., 87 L.ed. 626, 318 U.S. 80.

In Interstate Commerce Com. v. Louisville & N.R.Co., 227 U.S. 88, 57 L. ed. 431 (1913) the Commission had made findings after hearing. On appeal the Government sought to sustain the findings regardless of any evidence to support them. The U.S. Supreme Court said at U.S. p. 91-92-93, L. ed. page 433-434:

". . . A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

BY THE TERMS OF APPELIFE LONG BEACH FEDERAL'S
CHARTER IT COULD NOT BE AMENDED WITHOUT THE
ASSOCIATION'S CONSENT

The charter of an association or corporation (Long Beach Federal) is a contract between the corporation, the Bank Board and the association's members.

In The Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. ed. 629, the U. S. Supreme Court was considering the charter of Dartmouth College. The Court said at U. S. page 643, L. ed. page 661:

"This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, . . . "

By the terms of the contract between the Bank Board, the Association and all members of the Association the power of amendment to Long Beach Federal's charter is reserved to the joint action of the Bank Board and the association's members. Neither can amend it without the consent of the other. Section 11 of the Long Beach Federal charter, charter K provides:

"11. Amendment of charter. No amendment, addition, alteration, change, or repeal of this charter shall be made unless such proposal is

made by the board of directors of the association, and submitted to and approved by the Federal Home Loan Bank Board, and is thereafter submitted to and approved by the members at a legal meeting. Any amendment, addition, alteration, change, or repeal so acted upon and approved shall be effective, if filed with and approved by the Federal Home Loan Bank Board, as of the date of the final approval of or as fixed by, the members." [Emphasis added] 49

That such a contract was deliberately made by the Bank Board with the shareholders of all federal savings and loan associations including Long Beach Federal is explicitly stated by the board's then general counsel in his book "Savings and Loan Associations" by Horace Russell general counsel for Federal Home Loan Bank Board from 1932-1938. He says in Chapter 7 "The Federal Savings and Loan System" at pages 65 and 66:

"The Federal Savings and Loan System was organized under a very short statute because it appeared that a comprehensive statute could not be passed at that time. In order to avoid too numerous and rapid changes in the program, the device was used of incorporating all the remaining elements of a sound Savings and Loan law in the charter of the Association, and an agreement was accomplished that charters would not be amended without the consent of the Association and the Board. . . ." [Emphasis added]

The power to amend was reserved to the Congress to make any amendments to the law it might see fit with or without the consent of anyone. But the power of the Board to make amendments to the regulations affecting the charter of the Federal association was, by the terms of the Association charters as drawn by the Board's own general counsel, limited to changes consented to

by the Associations. Section 3 of Long Beach Federal's charter K reads:

" The association shall have such powers as are conferred by law and shall exercise its powers in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, or as they may hereafter be amended, and with the rules and regulations made thereunder which are not in conflict with this charter."
[Emphasis added] 50/

The Federal Home Loan Bank Board by giving Long Beach Federal Savings and Loan Association its charter contracted with the Association and with every future savings investor therein. The charter (contract) repeatedly stated that the association would be mutual and that all savings investors would receive equal and mutual treatment. Section 3 of the charter reads:

"3. Objects and powers. -- The objects of the association are to promote thrift by providing a convenient and safe method for people to save and invest money and to provide for the sound and economical financing of homes. The statute, this charter, and rules and regulations made thereunder provided for examination and supervision and at the same time for the protection of all private rights concerned, and shall be construed in keeping with the best practices of local mutual thrift and home-financing institutions in the United States." [Emphasis added]

Section 9 of the Charter reads:

"9. . . . All holders of share accounts shall participate equally in dividends pro rata to the participation value of their share accounts; provided that the association shall not be required to credit dividends on inactive share accounts of

\$5 or less. . . . All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the association." [Emphasis added] 51/

To now require that all share accounts of over \$10,000 each, or which are pledged or assigned, shall not "be entitled to the equal distribution of net assets, pro rata to the value of their share accounts . . ." is to amend and repeal Long Beach Federal's charter. The charter says:

"All holders of share accounts shall participate equally."

The Bank Board says:

"No share account of more than \$10,000 or which was pledged or assigned shall participate at all."

Instead all share accounts of less than \$10,000 which were not pledged or assigned are to take what belongs to them and also to take what belongs to the over \$10,000 accounts, or to the accounts pledged or assigned.

This confiscates about \$2,500,000 that belongs to the \$10,000 (or over) accounts and gives it to the less than \$10,000 accounts.

This is neither equality nor mutuality.

It denies "the equal protection of the laws" guaranteed by the United States Constitution. It also violates the "due process" clause of said Constitution.

XI.

THE TRIAL COURTS 1,899 JUDGMENTS ARE JUST
AND EQUITABLE. THEY SHOULD BE AFFIRMED
REGARDLESS OF WHETHER THIS COURT OF APPEALS
APPROVES ALL THE TRIAL COURTS REASONS FOR
ENTERING SUCH JUDGMENTS.

Appellants attack the trial court's judgments as if they were but a single judgment. Actually, the trial court made over 1,899 separate judgments.^{52/} Appellants forfeited the 1,899 savings accounts rights to share in the association's surplus regardless of any individual alleged "guilt" or innocence of any one or more of the approximately 3,800 forfeited savings depositors who owned the 1,899 forfeited savings accounts.^{53/} Appellants forfeited all single new savings accounts to the extent they exceeded \$10,000 per account. But yet permitted an unlimited series of new accounts of \$10,000 each, owned by a single family, to participate in full.

Appellants also forfeited all savings depositors, old or new, big or little, who had pledged or assigned their savings account for any debt.

^{52/} 3R 1642 through 1706 is 64 pages of separate judgments in favor of each of the 1,899 savings accounts which appellants forfeited. Each item is a separate judgment for each savings account owner. There are about 40 items per page and a total of 50 pages.

^{53/} Most savings accounts are owned by 2 or more savings depositors as co-owners, joint tenants, trustees for minor children, etc.

It is no fraud, crime or wrong to borrow money and pledge a savings account as security. Nor is it a fraud, crime or wrong to have more than \$10,000 in any single new savings account.

Yet these are the only tests of appellants forfeitures. Appellants forfeit all single new savings accounts to the extent they exceed \$10,000. Yet they favor 10 new savings accounts of \$10,000 per account or less totaling \$100,000 or more, all owned by members of the same family.^{54/}

Individual innocence or alleged "guilt" of any of the owners of the forfeited savings accounts was no part of the reason or basis for any of appellants forfeitures.

Instead all appellants forfeitures were by arbitrary classification wholly regardless of any individual merits, or justice or right or alleged "wrong".

The trial court invalidated all of appellants 1,899 forfeitures as " . . . illegal, and void, . . . arbitrary and contrary to, and without authority in, law." [233 F. Supp. 578 at 598 - Appx. 1-a hereof].

But in entering judgment the trial court was careful to separately enter 1,899 separate judgments. There is a separate individual court judgment in favor of each individual savings account illegally forfeited by appellants.^{55/}

^{54/} See page 79 to 82 hereof for more details re appellants treatment of multiple accounts of \$10,000 per account.

^{55/} 3R 1642 through 1706 is 64 pages of separate judgments in favor of each of the 1,899 savings accounts which appellants forfeited. Each item is a separate judgment for each savings account owner. There are about 40 items per page and a total of 50 pages.

The smallest such judgment is for .013 shares of Equitable guarantee stock. The largest is for 9230.769 shares. 1524 of such judgments are for 120 shares or less.

As to the thousands of wholly innocent and un-accused savings depositors, the trial court's 1,899 judgments are obviously correct and should be forthwith affirmed. There can be no possible justice or equity in taking any innocent savings depositors " . . . property and money, and giving it to another, as the [appellant] Bank Board attempted to do here." [233 F. Supp. 578 at 598 - Appx. 1-a hereof].

Nor can justice tolerate reversal of thousands of just judgments in favor of thousands of innocent savings depositors.

Yet appellants demand such mass reversal of all 1,899 judgments regardless of the individual innocence or alleged "guilt" of any one or more of the 3,800 depositors who hold the 1,899 trial court judgments.

Appellants falsely pretend to "protect" the "little savings depositors" against the big new depositors.

But of 1,899 savings accounts forfeited by appellants and restored by the trial court's judgments:

324 are \$ 500.00 or less

1,524 are \$ 11,000.00 or less

only 54 are \$100,000.00 or over. 56/

56/ (233 F. Supp. 578 at 599, last paragraph of FN) also plaintiffs exhibit "13" on motion for summary judgment.

If there were any "guilty" savings depositors among the thousands of forfeited innocent depositors appellants were required by law to individually accuse each of the "guilty" by name; and to specifically state what crime or wrong each was accused of. After each such individual accusation notice and hearings were required to hear and decide such accusations.

Appellants forfeitures consist of taking the statutory and charter shares of Long Beach Federal's \$9,500,000 surplus from the forfeited savings depositors and giving such forfeited shares to other savings depositors in defiance of the Act of Congress.

It is not necessary to forfeit the savings accounts of thousands of innocent savings depositors to establish and test the awesome powers of appellants Bank Board and California Savings and Loan Commissioner.

Their powers are vast and terrible. But such powers exist only to punish the "guilty," not to forfeit the innocent. And the power to punish the "guilty" by forfeiture exists only after personal individual accusation of specified guilt followed by notice and hearing.

The trial courts 1,899 separate judgments setting aside appellants illegal and arbitrary forfeitures are correct in result. They should be affirmed regardless of the reasons given by the trial court for its decision.

In Castner v. First National Bank of Anchorage, 278 F. 2d 376 (CA-9, 1960) this court of appeals was reviewing a summary judgment. This court said at page 381:

" . . . However, we are not concerned with the reasons given by the district judge for his action but rather center our inquiry upon a determination of whether the judgment he entered was right. J. E. Riley Investment Co. v. Commissioner, 1940, 311 U. S. 55, 61 S. Ct. 95, 85 L. Ed. 36; Kanatser v. Chrysler Corp., 10 Cir., 1952, 199 F. 2d 610; 5 C.J.S. Appeal and Error § 1464 (1). To do this we must now proceed to examine the record as it was presented."

In J. E. Riley Invest. Co. v. Commissioner of Int. Rev.

311 U. S. 55, 85 L. ed. 36 (U.S. Supreme Court 1940) the U. S. Supreme Court said at U. S. page 59, L. ed. page 40:

" . . . Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action. Helvering v. Gowran, 302 US238, 245, 246, 82 L ed 224, 229, 230, 58 S Ct 154.

"Affirmed."

In Kanatser v. Chrysler Corp., 199 F. 2d 610, (CA-10, 1952) [Cert. denied 344 U. S. 921, 97 L.ed 710] the U. S. Court of Appeals for the Tenth Circuit said at page 616:

" . . . Respondent thus invokes the time honored and salutary rule to the effect that the issue on appeal is the correctness of the order or judgment assailed, not the reasons therefor, and if such order or judgment is sustainable on any legal basis, it is the duty of the appellate court to do so, even though the trial court may have given the wrong reasons for the order. U. S. v. American Ry. Exp. Co., 265 U.S. 425, 44 S. Ct. 560, 68 L.Ed. 1087. . . ."

By U. S. Statute and by Long Beach Federal's charter all savings depositors old and new, big and little were to be treated exactly alike.

Long Beach Federal's charter, section 9 reads:

" * * * All holders of share accounts shall be entitled to equal distribution of net assets, pro-rata to the value of their share accounts, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the Association."

[233 F. Supp. 578 at 592; also pls. exh. "19"]

The:

" . . . statute provides that such Association shall be 'mutual', [12 U.S.C. §1464 (a)]; it requires the '[s]uch associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided.' [12 U. S. C. § 1464 (b)]; . . ."

Upon conversion of Long Beach Federal from a federal to a California state association by merger with appellee Equitable, the U. S. statutes made an additional express requirement:

" . . . 12 U. S. C. § 1464 (1), under which the conversion and dissolution is had, contains the second Congressional expression in the Statute as to the distribution of stock upon conversion and dissolution. . . . It reads: '(6) that, in the event of dissolution after conversion, the members or shareholders of the association will share on a mutual basis in the assets of the association in exact proportion to their relative share or account credits.' . . ."

[233 F. Supp. 578 at 592]

Forfeiture is a form of punishment for crime, fraud or wrong doing. It can be inflicted only after and not before accusation, notice and hearing.

Appellants forfeitures violate Long Beach Federal's charter, the U. S. Statutes and the U. S. Constitution. No individual forfeited savings depositor has ever been accused by appellants of anything.

In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746
(1886) the United States Supreme Court said at U. S. pages 634-
635, L. ed. page 752:

" . . . proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, . . . illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. . . ."

No forfeited savings depositors has been named nor has any forfeited savings depositor ever been notified of what, if any, wrong, crime or fraud he is accused of.

Appellants have made no finding of any fraud, wrong or crime by anyone. Yet, appellants Bank Board had their forfeitures under consideration for almost a year and had before them the individual savings account records of every savings depositor who they forfeited. [Pls. Exh. "21-62"].

No forfeited savings depositor has been heard to defend himself against appellants unknown and unstated accusations.

Forfeiture of savings depositors statutory and charter rights is a punishment which appellants can constitutionally inflict only upon proof of individual guilt or wrong against each and every forfeited savings depositor.

Appellants have offered no such proof.

Appellants have not even made accusation, against any individual savings depositor.

Appellants had four or more opportunities to make such accusations and to offer any proof they had.

Appellants most important opportunity was in appellant Bank Board's findings made in their order ^{57/} No. 17,177 dated June 14, 1963 approving merger it reads in part:

"WHEREAS, The Federal Home Loan Bank Board has determined that the dissolution of Long Beach Federal Savings and Loan Association in the manner embodied in said Merger Agreement, dated June 12, 1963, is advisable and in the interest of all concerned; and

57/ It is Pls. Exhibit "3-D-4" in evidence.

that the distribution of the 791,650 shares of guarantee stock of Equitable Savings and Loan Association to the shareholder members of Long Beach Federal Savings and Loan Association in the manner specified in Articles VII and VIII of said Merger Agreement is fair and equitable;"

In that order Appellants Bank Board made its only findings. The Board, had been considering the proposed merger of Appellee Long Beach Federal in to Appellee Equitable for over a year when it made said Order. Appellant Bank Board had before it for many months the individual savings and loan records and accounts of all the 1,899 forfeited savings deposits. [Pls. Exh. "21-62"]

The only findings whatever made by appellant Bank Board are that the forfeitures it requires are "advisable and in the interest of all concerned" and "fair and equitable". No where in said order, or anywhere, are any of the 3,800 forfeited savings depositors accused of anything. Nor is there any finding of any fraud, crime or wrong doing.

Appellants' next most important opportunity to make accusations or offer proof was before the mass meeting of the assembled shareholders of Long Beach Federal held in the Municipal Auditorium at Long Beach California.

Such mass meetings were held on April 27, 1963 and recessed until July 6, 1963. [Pls. Exh. "7-A-2-5; 7-A-2-8 " 12/9/63-6]

Appellants Bank Board representatives attended and were present at said mass meetings of said Long Beach Federal savings

depositors. [Pls. Exh. "7-A-4-8" at pg. 57 and 12/9/63-8]

At said meeting resolutions were unanimously passed by said Long Beach Federal savings depositors thanking the new and large savings depositors and those who had borrowed money to make deposit in savings accounts in Long Beach Federal for coming to the aid of the wrecked association in this hour of dire need.

Such resolutions are:

Plaintiff's exhibit 12/9/63-6 page 7. ^{58/}

Appellants Bank Board representatives were present at said meeting. Yet they had nothing to say to the assembled Long Beach Federal savings depositors. [12/9/63-6 pg. 7]

If appellants had any proof of fraud, crime or wrong doing against any savings depositors, it was appellants statutory duty to present that proof to warn the assembled savings depositors and for their consideration, when the resolutions thanking the larger savings depositors were unanimously passed by all Long Beach Federal savings depositors.

Appellants third most important opportunity to make accusations or present proof was when they drafted their answers and defenses to plaintiff's complaints in the class action in the trial court.

It is fundamental and basic law that fraud must be specifically alleged in detail and must be thoroughly established

^{58/}

See also pages 135 and 137 hereof where the adoption of such resolution is further discussed.

by evidence and proof. 59/

59/

Federal Rules of Civil Procedure Rule 9 (b) requires:

"PLEADING SPECIAL MATTERS

"(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . . "

This Ninth Circuit Court of Appeals has repeatedly ruled that fraud must be specifically alleged in detail and proved and established by clear and convincing evidence.

In Richmond v. Weiner, 353 F. 2d 41 (CA-9, 1965) this Court of Appeals said at page 45:

"The law requires that fraud as an issue be specifically pleaded as indicated by the following:

'Clearly, in an action for deceit, or other suit in which the cause of action is based directly upon fraud, the fraud must be pleaded.' 24 Am. Jur. 72.

'In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.' Rule 9(b), F.R. Civ.P.

'A pleading requisite to enable the party who files it to offer parol evidence of fraud in a written contract for the purpose of avoiding the contract should contain allegations of the fraud that are clear and positive.' 24 Am. Jur. 74; 56 A.L.R. 148.

"Here appellant did not, in her original complaint, in her answer to appellee's counterclaim or in the pretrial order, allege or contend . . . fraud. . . . We, therefore, on this appeal cannot consider that issue, because appellant did not plead it or validly bring it before the Trial Court, and that Court properly did not determine it. United States v. Waechter, 9 Cir., 1952, 195 F. 2d 963, 964; Pacific Queen Fisheries v. Symes, 9 Cir., 1962, 307 F.2d 700, 719-720; Monge v. Smyth, 9 Cir., 1956, 229 F.2d 361, 366 Syl. 2."

Yet appellants answers contain no specific accusations against anyone by name, by amount, by savings account number or any other detail. Only vague generalities are hinted at, but not alleged by appellants Bank Board, et al. Appellant Savings and Loan Commissioner makes no allegations whatever of fraud, etc.

[1R-371-374]

Appellants were specifically asked by the Trial Court if they wished to file any cross-complaint or make any specific allegations. Appellants expressly declines to do either. ^{60/}

Appellant's fourth opportunity to make accusation and to present proof of any fraud, crime or wrongdoing was when the Trial Court ordered both sides to serve and file Motions for Summary Judgments and to make replies or oppositions to such Summary Judgment Motions.

Appellants made no factual showing of any kind whatsoever naming any names, referring to any amounts or any savings account numbers or stating any facts of any fraud, crime or wrong against any named savings depositor or specific savings account amount among all the 1,899 which appellants have forfeited.

Instead, appellants made vague references to "dilution", "insiders" and similar uncertainties.

Appellants had taken 6 depositions among them were the President of Long Beach Federal, the President of the City National Bank of Beverly Hills, and several large Equitable stockholders and Long Beach Federal depositors.

The depositions covered 341 pages with an additional 42 pages of exhibits. Yet appellants did not offer any of said depositions or any part thereof for the consideration of the Trial Court, nor did they in any way bring said depositions or any of them to the attention of the Trial Court.

Appellants attempted, nevertheless, to use said depositions (never seen by the Trial Court) as part of their record on their appeal to this Court and even filed their opening briefs containing reference to such depositions never seen by the Trial Court.

After hearings before this Court of Appeals on notice, appellants were required to re-brief their case omitting therefrom all references to the depositions and other matters never offered by appellants to the Trial Court not seen or considered by that Court.

The Order of this Court of Appeals so ordering is filed in these appeals in appeal numbers 20522, 20378 and 20447 and is dated September 20, 1966.

No where in appellant's brief to this Court of Appeals has any appellant made any claim or showing to justify forfeiture of all 3,800 savings depositors who hold the 1,899 forfeited savings accounts.

On page 55 of appellant Bank Board's opening brief they refer to 7 or 8 depositors who have individual accounts ranging between a \$1,167,800.00 and \$250,000.00.

On page 54 they make a tabulation that shows that Long

Beach Federal had 33 accounts of \$20,000 to \$50,000 each in 1960 and 124 such accounts in 1962.

On page 10 they make further comparison as to 6 accounts of over \$100,000 each at the time of merger as contrasted but with one account of \$100,000 before the 1960 seizure.

It is thus obvious that appellant's forfeitures of 1,899 savings accounts are not based upon any individual wrong, fraud or crime of any forfeited account holder, but solely upon the size of the account or status as pledged or assigned to secure debt.

To state the matter plainly as found by the Trial Court, appellants forfeitures are purely arbitrary and without basis in law. (233 F. Supp. 578 at 598)

Appellant Bank Board's own Chairman McMurray under oath stated the only basis for the forfeitures. He said "the \$10,000 figure was selected because it was the maximum amount of federal account insurance; the board believe that generally that accounts would not be opened by bona fide savers in amounts larger than \$10,000 in any one account." Appellants opening brief page 15-16 (McMurray Affidavit 3R-1002) But he told Congress the contrary. (See page 61-63 hereof)

But whether or not a savings account is "bona fide" cannot be determined solely by the size of the individual accounts. \$100,000 deposited in a single account can be genuine and bona fide and another \$100,000 deposited in 10 separate accounts of \$10,000 each in the names of combinations of husband and wife,

husband and daughter, wife and son, husband and mother-in-law, etc., so as to make 10 separate accounts, numbers and groups would appear to demonstrate lack of genuineness rather than being bona fide.

Yet the \$100,000 single account is forfeited by appellants and the 10 \$10,000 single accounts aggregating \$100,000 are favored and preferred. They take not only their own share of Long Beach Federal surplus but also the forfeited shares of the \$100,000 single accounts.

Appellants Bank Board "belief" that new accounts would not be opened by bona fide savers in amounts larger than \$10,000 in any one account is demonstrated false by the survey made by the United States Savings and Loan League at year end 1964. The 1965 SAVINGS AND LOAN FACT BOOK issued by said league says in part on page 19:

"At year-end 1964, a survey by the United States Savings and Loan League shows, 31.4% of all savings at associations were in accounts that had balances in excess of \$10,000. . . ." (emphasis added) 61 /

61 / In United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L.ed. 2d 915 (1963) the U. S. Supreme Court said at U. S. page 323, L. ed. page 922 in footnote 2:

"2. The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. . . ." (emphasis added)

listing text books on banking, articles in banking trade association journals, law review articles and various publications.

Thus appellants swore under oath that they believed almost one-third of all the savings accounts in all the savings and loan associations throughout the United States are "not opened by bona fide savers" because such accounts had balances in excess of \$10,000 each.

XII.

\$4,606,250,000 OF NEW SAVINGS DEPOSITS WERE
MADE IN 108 LOS ANGELES - LONG BEACH SAVINGS
ASSOCIATIONS IN 1962. NONE WERE PENALIZED
EXCEPT LONG BEACH FEDERAL

In April 1960, appellants seized Long Beach Federal for the second time. Long Beach Federal then had about \$96,000,000 in savings deposits. [3R-1126] Appellants' 1960 program was to again ruin and destroy the seized Long Beach Federal as they had in 1946-1948. A \$69,000,000 run of withdrawals of savings deposits followed the 1960 seizure. [3R-1126] By April 1962, but \$30,000,000 of savings deposits remained in the wrecked Association, when it was returned to its founding management. [3R-1138]

\$24,000,000 of new savings deposits came into the Association within two days of its restoration and \$42,000,000 of new deposits were in the Association by November 30, 1962.

Appellants would partially forfeit and penalize \$19,000,000, or almost one-half, of these new savings deposits.

Appellants pretend that the \$42,000,000 of new savings accounts are "temporary" or "free riders". But the truth is, appellants were bitterly disappointed that Long Beach Federal could regain any of its lost savings deposits.

Appellants originally based their entire attack on the all new savings depositors because of accounts of \$100,000 or more each. But these 54 accounts constituted only 3% by number of the approximately 1,900 savings accounts now forfeited and penalized

by appellants. Over 80% by number (about 1,524) of the savings accounts appellants would forfeit, are each \$11,000 or less. About 17% (about 324) are each \$500.00 or less. [3R-1511]

Certainly Long Beach Federal should be able to regain its original \$96,000,000 of savings deposits it had at the time of its 1960 seizure.

The \$42,000,000 total of new savings deposits added to the \$30,000,000 remnants of April 1962, came to only \$72,000,000 total. Long Beach Federal was yet short by about \$24,000,000 from being back to the \$96,000,000 in savings deposits it had when seized in 1960. Yet, for this partial recovery, thousands of the new savings depositors are penalized and forfeited by appellants.

Appellants falsely pretend that rapid changes in savings accounts are unusual or evil. Appellant's Bank Board Chairman McMurray says accounts of over \$10,000 are temporary and are not bona fide. But their own Source Book published by them for the year 1963, discloses that the average turnover in all 108 savings and loan associations in Long Beach and Los Angeles area for the calendar year 1962 was over one-half, or about 54% of the total of all savings deposits. Photocopies of the cover pages and pages 12 and 18 of appellants' 1963 Source Book are Appendix 1-d hereof. They disclose:

	<u>Percentage</u>
Total 1962 savings capital all 108	
Los Angeles - Long Beach savings	
associations (page 12 of the	
Source Book)	\$8,549,444,000 = 100%
Total 1962 <u>new</u> savings capital	
deposits in <u>all</u> 108 Los Angeles -	
Long Beach savings associations	
(page 18 of the Source Book)	\$4,606,250,000 = 54%

54% of Long Beach Federal's 1960 total of \$96,000,000 of savings deposits is \$51,840,000. Long Beach Federal in 1962 got back only \$42,000,000 of new deposits. This is about \$10,000,000 less than the average percentage of new deposits in all 108 savings associations in the Long Beach - Los Angeles area.

Yet appellants would forfeit and penalize thousands of Long Beach Federal savings depositors. But NONE of the depositors in any of the 107 other Long Beach - Los Angeles area associations are penalized or forfeited in any way.

Appellants own Source Book demonstrates that a 54% turnover in savings deposits for the year 1962 was the average for all the 108 savings and loan associations then in the Los Angeles - Long Beach, California area.

The net result to each association of said 54% turnover, of course, differs. Some gained, others lost.

But these figures of a 54% yearly turnover demonstrate the falsity of the appellants pretenses that any savings depositors are permanent. In two years 108% will be new deposits.

The penalties inflicted on Long Beach Federal alone because of rapid shifting or transferring of savings deposits is pure animosity of the appellant Bank Board against Long Beach Federal. Otherwise all of the 107 other savings associations in the Los Angeles - Long Beach area should have also been penalized for their 54% average turnover in total savings accounts in 1962.

The penalizing of Long Beach Federal savings depositors who made their deposits in amounts of \$10,000 or more per account is even more revealing.

XIII.

APPELLEE SHAREHOLDERS' PROTECTIVE COMMITTEE
PROPERLY REPRESENT ALL 60,000 LONG BEACH FEDERAL
SAVINGS DEPOSITORS. THEY REFUSE TO ACCEPT ANY
FORFEITED STOCK: NONE HAVE JOINED WITH APPELLANTS

Appellants attack the District Court's findings and order that appellee Shareholders' Protective Committee properly represent the entire class of all 60,000 Long Beach Federal savings depositors.^{62/}

No appellant, however, tells this Court that the District Court made this finding only after several days of trial (December 9-12, 1963)^{63/} with witnesses on the stand, exhibits introduced and cross-examination by appellants counsel Assistant U. S. Attorney Dooley. Prior to said trial an Order to Show Cause, notice of hearing and a copy of plaintiff's entire complaint in action No. 63-1072-P.H. was personally mailed to everyone of the 60,000 savings depositors at their respective addresses shown on appellee Long Beach Federal's savings records. Such mailing was done pursuant to the order of the District Court.

Said Order to Show Cause and notices were also published in the Long Beach daily newspapers and other Los Angeles County newspapers. This was but one of 5 similar notices given to all

^{62/} Appellant Bank Board makes its attack in footnote 2, page 3 of its opening brief. Appellant California Savings and Loan Commissioner makes his attack at page 42-47 in his opening brief.

^{63/} Plaintiff's Exhibits 12/9/63 and 12/12/63.

Long Beach Federal depositors by direct mailing and by publication. 64/

64/ No Long Beach Federal savings depositors will accept any of the forfeited stock offered them by said Bank Board. Repeated notices have been mailed, and published, to all 60,000 Long Beach Federal savings depositors of the Bank Board's forfeitures and preferences. Said publication was in Long Beach and Los Angeles daily newspapers. Said mailings were personally addressed to each of the thousands of Long Beach Federal depositors.

Such notices include those mailed and published:

(a) In March, 1963, of the April, 1963 special mass meeting of Long Beach Federal savings depositors held in the Long Beach Municipal Auditorium; [Pl's. Exh. 12/9/63-6; 7-A-2-5; 7-A-2-3]

(b) In June, 1963, of the July 6, 1963 continued, and resumed, mass meeting of Long Beach Federal savings depositors in the Long Beach Municipal Auditorium; [Pl's. Exh. 12/9/63-7; 7-A-AA-3-2]

(c) In July, 1963, of the August 16, 1963, public hearing held by the Savings and Loan Commissioner of the State of California; [12/12/63-13]

(d) In November, 1963, of the Order of Distribution of \$7,000,000 of said Equitable stock from Court among said 60,000 Long Beach Federal savings depositors; [3R-298-300BBB] and

(e) In May, 1965, of the entry of Judgment by the U. S. Trial Court for equal and pro rata distribution and declaring said forfeitures illegal and void, and of plaintiff's application for attorneys' fees. [3R-1748-1755]

These notices are all in addition to the mailed and published notices of March 1962 of the court dismissal of the class actions [3R-1748-1755] in reliance upon said Settlement Agreement and its provisions for equal and pro rata distribution.

In each of the mailed and published notices sent to all 60,000 Long Beach Federal savings depositors, by order of the court, there was a requirement made by the court that any savings depositor objecting to equal and pro rata distribution appear before the court and state his objections. [3R-1753-1755] With but one exception none of the 60,000 savings depositors ever made any objection. The lone objector was an attorney whose stock distribution would have amounted to less than \$200. He at first appeared and objected, but later dropped out. He never intervened or took any active part in the litigation. He is not a party to these appeals. He appeared for himself alone. He was one alone, out of 60,000. [233 F. Supp. 578 at 591]

None of the 60,000 savings depositors would take the forfeited stock of their fellow depositors. None have appeared before this or any court and sought to enforce said forfeitures. Nor do any of them support the Bank Board's position. Nor do any of them join appellants in these appeals.

No appellant offered any testimony or offered to produce any evidence to the trial court that the Shareholders' Protective Committee who for 20 years has litigated before the U. S. Supreme Court, this Court of Appeals, the Federal trial court, the California State trial and appellate courts and Congressional Committees, has now suddenly become disabled to continue such representation.

In Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (CA-9, 1964) this U. S. Court of Appeals for the Ninth Circuit said at page 914:

" . . . Adequacy of representation is a question of fact, to be raised and resolved in the trial court in the usual manner (Warner v. First Nat. Bank, 236 F.2d 853, 858 (8th Cir. 1956); Weeks v. Bareco Oil Co., 125 F.2d 84, 93-94 (7th Cir. 1941)), and assertions in defendants' brief in this court are ineffectual to make a factual issue on plaintiffs' allegations of ability to protect the interests of the class, much less to disprove them." (Emphasis added)

Appellant Bank Board has changed its position before this Court of Appeals on the question of adequacy of plaintiff Shareholders' Protective Committee to represent the entire class of Long Beach Federal shareholders.

In the last paragraph in footnote 13 on page 11 of said appellant's Memorandum in Support of Motion for a Stay filed in this Court of Appeals about September 20, 1965, appellant Bank Board says:

"The adequacy of the representation by the Shareholders' Protective Committee of the Long Beach shareholders adversely affected by the judgment below is not being raised. The appellant Bank Board has the right to represent their interests and to enforce their claims

to the Equitable stock in dispute. Reich v. Webb,
336 F. 2d 153 (C.A. 9), cert. den. 380 U.S. 915."

Appellants reference to Reich v. Webb is particularly interesting because this Court of Appeals in that case cited with approval and quoted from Federal Home L. B. Bd. v. Greater Del. Val. Fed. S.& L. Ass'n 277 F. 2d 437 (CA-3, 1960) in that case the Bank Board alone sought to void the conversion of Greater Delaware Valley Federal from a Federal association into a Pennsylvania State association. No savings depositor of Greater Delaware Valley Federal had joined the board in the litigation in either the trial or appellate court. The Court of Appeals denied the Bank Board the relief it sought and said at page 441:

" . . . However, no shareholder has joined in this claim that the shareholders have been wronged by any unfair conduct. There is no evidence, not even an allegation, that any shareholder was in fact misled or in any way adversely affected by the failure of the proxy notice to contain the information the Board thinks it should have contained. Thus, the Board's position is not supported either by a showing of deception and injury in fact or by a showing that notice as given has failed to comply with any stated or formal requirement of law. We find no merit in it." (Emphasis added.)

Our own Ninth Circuit Court of Appeals has cited and followed the Greater Delaware Valley Federal case.

In Reich v. Webb, 336 F. 2d 153 (CA-9, 1964) [Cert. denied 380 U. S. 915; 13 L. ed. 2d 800 3/65], this Ninth Circuit Court of Appeals considered the Greater Delaware Valley Federal decision and said at page 157:

" . . . In that case the Bank Board sought a

declaratory judgment voiding the conversion of a Federal Savings and Loan Association from a federal to a state charter until the approval of the Bank Board was obtained. No duty on the part of the Association to obtain Bank Board approval existed either at common law, by statute or by Bank Board regulations. . . . Basically the holding stands for nothing more than a declaration that substantive liability cannot be created by the Bank Board apart from statute, a proposition with which we fully agree." (Emphasis added.)

In Greater Delaware Valley Federal the Bank Board tried to nullify the conversion from a Federal to a State association. But " . . . no shareholder has joined [the Board] in this claim . . . ". In our present case the appellant Bank Board has tried to forfeit \$2,500,000^{65/} of Equitable guarantee stock from several thousand Long Beach Federal savings depositors. Of the 60,000 depositors who might have claimed the forfeited stock, none (except Attorney Stevens for less than \$200) has joined the Bank Board in this claim. Not even this one attorney has joined the Bank Board in these appeals.

Appellant Bank Board received copies of each of the 5 separate notices, documents, and mailings sent by the Shareholders' Protective Committee and by Long Beach Federal by direct personal mailing to each of the 60,000 Long Beach Federal savings depositors. Said appellants, through their staff, required repeated drafting and redrafting of the 55 page "Proxy Statement for Special Meeting of Members of Long Beach Federal Savings and Loan Association" so mailed in June, 1963. It contained every statement required by said Bank Board.

Appellants Bank Board, et al., through their counsel, participated in the Court's drafting [Tr 53-99] of the mailing in November 1963 of the:

- (a) "Order of Distribution of Part of Guarantee Stock" (8 pages);
- (b) "Notice of Entry Of 'Order of Distribution of Part Of Guarantee Stock' And of Court Hearings In Class Actions For Partial Distribution of Equitable Savings and Loan Association Guarantee Stock to Savings Shareholders of Long Beach Federal Savings and Loan Association" (6 pages); [1R; 2R-361-366; 3R-300I-300H]
- (c) "Complaint To Quiet Title and For Declaratory Relief and Other Relief" in action No. 63-1072-P.H., (27 pages); [1R; 2R-361-366; 3R-300I-300H]
- (d) "Stipulation" for distribution of 585,821 shares of Equitable stock, dated October 29, 1963, (3 pages); [1R; 2R-395-397; 3R-300QQ-300SS]
- (e) "Merger Agreement", exhibit B, (8 printed pages); [1R; 2R-398-405; 3R-300TT-300AAA] and
- (f) "List of Class Actions" (1 printed page). [1R; 2R-406; 3R-300BBB]

These documents comprise a total of 53 pages.

Appellants made their objections to the court as to part of the contents of said notices thus given. The court considered said objections, passed upon them, made changes in the notice, etc., and approved the form of notice so given. [TR-53-99] It was mailed to all 60,000 savings depositors and published as ordered by the court. [3R-298-311]

Appellants', Bank Board and Insurance Corporation, representatives attended the April 1963 and July 1963 special mass meetings of Long Beach Federal savings depositors assembled in the

Long Beach Municipal Auditorium. Appellants' representatives were introduced to said shareholders at said meeting. They had nothing to say to the shareholders. Appellants' representatives heard the numerous questions then asked by the shareholders concerning said forfeitures and answered by the President, the attorneys, or other officers of Long Beach Federal. [Pl's. Exh. 7-A-4-8]

Appellants' representatives also heard the unanimous approval of a Resolution by the assembled Long Beach Federal savings depositors thanking the new \$100,000 and over savings depositors for their deposits and condemning as "arbitrary, unjust and illegal" the Bank Board's attempted forfeitures. [A copy of the entire Resolution is Appx. I-c hereof.] Extracts from said Resolution are:

"RESOLUTION

THANKING NEW SHAREHOLDERS

FOR THEIR INVESTMENTS

"WHEREAS, there are represented at this special meeting of the shareholders and members of Long Beach Federal Savings and Loan Association, in person or by proxy, more than 42,000 citizens holding shares in this Association convened in this special meeting on April 27, 1963 in the Long Beach Municipal Auditorium; and

"WHEREAS, our Association has three or more times been seized or threatened with seizure; and

"WHEREAS, in the seizure of May, 1946 to January, 1948, our Association share accounts were reduced by runs of withdrawals of more than \$10,000,000.00 amounting to almost one-half of our then total of approximately \$22,000,000.00 of savings share accounts; and

"WHEREAS, in the seizure of April, 1960-1962, a run of withdrawals of approximately \$69,000,000.00 reduced our association's savings share accounts from

more than \$98,000,000.00 to approximately \$28,000,000.00 or more than two-thirds; and

"WHEREAS, in 1949-1952 our Association was threatened with yet another seizure which was prevented only by an injunction of the United States Court; and

". . .

"WHEREAS, upon the restoration of our Association from said seizing agencies substantial amounts of ready cash were and yet are essential for the safety and continued existence of our restored Association; and

". . .

"WHEREAS, by the opening of such new accounts and the reopening of closed accounts, our Association in the month of April, 1962 increased its savings accounts by over \$24,000,000.00 and almost doubled the total of such savings accounts from the approximately \$28,000,000.00 low of said seizure period to a savings account balance of \$79,642,896.31 as of June 30, 1962 within three months after restoration from government seizure; and

". . .

"WHEREAS, many of the accounts coming to our Association in said growth of over \$40,000,000.00 of savings accounts in less than three months were accounts exceeding \$100,000.00 each in amount; and

"WHEREAS, many of said savings accounts constituting said \$40,000,000.00 increase in savings were used as security by said savings account holders for loans obtained by them from outside banks and other financial sources; and

". . .

"WHEREAS, the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation who have inflicted the damage and destruction on our Association of said seizures and runs and misleading front-page newspaper publicity thereof, now insist and demand that said new savings account holders in our Association whose accounts have been so used for security of bank loans or whose accounts exceed \$100,000.00 each must be required to forfeit their respective shares of the net surplus, reserves and undivided profits of our Association upon the combining of our Association with Equitable Savings and Loan Association as provided in Article XV of the Settlement Agreement of February 14, 1962 between our Association and said Bank Board and Insurance Corporation; and

"WHEREAS, we believe said attempted forfeiture is a violation of the charter of our Association, the savings account contracts made upon the creation or investment in said savings accounts, and is also contrary to, and in conflict with, the Constitution and laws of the United States and of the State of California and is a denial of due process and denial of equal protection under the laws and is an arbitrary and unlawful exercise of a nonexistent power.

"NOW THEREFORE, WE, THE SHAREHOLDERS AND MEMBERS OF THIS ASSOCIATION, DO HEREBY RESOLVE:

"1. That we the shareholders and members of this mutual savings and loan association hereby express our appreciation and gratitude to each of our savings account investors who demonstrated their confidence in our Association upon its restoration on April 2, 1962, by thereafter:

"(a) Investing in new savings accounts or increasing the amounts of existing accounts in amounts in excess of the \$10,000.00 insurance of accounts; and

"(b) Also borrowing from banks and using their said savings accounts in our Association for security for said bank loans or otherwise pledged their personal credit and resources to obtain money to invest in our mutual savings Association in its time of peril and need immediately following said restoration.

"2. We condemn as arbitrary, unjust and illegal the attempts of the seizing Bank Board and Insurance Corporation, or their successors, to compel an unconstitutional and illegal forfeiture of our said savings account investors' rights to their proportionate share of our Association's net surplus, reserves, and undivided profits."

Until this resolution was passed appellants Bank Board, et al., had sought to forfeit only savings accounts in excess of \$100,000 each. After said resolution was passed appellants expanded their forfeitures to include all savings accounts pledged or assigned for any debt regardless of the size of the savings

account and to also forfeit all accounts of over \$10,000 per account to the extent each such account exceeded \$10,000. [Pl's. Exh. 21-41 page 6]

Five times Long Beach Federal savings depositors have received written notices (totaling over a hundred pages) discussing the Bank Board's forfeitures. Twice Long Beach Federal savings depositors have assembled in special mass meetings in the Long Beach Municipal Auditorium. Twice the U. S. Trial Court has passed upon and ordered the form and contents of the notices to be sent by mail to all 60,000 Long Beach Federal savings depositors and also published in the daily newspapers.

Out of all these notices, meetings and discussions, only one of the 60,000 Long Beach Federal savings depositors would accept any of the Bank Board forfeitures. The forfeited stock he was willing to accept amounts to less than \$200 out of a total of \$9,500,000. He has now dropped out of the case and is not a party to these appeals.

Thus, the majority, by number of savings depositors, is now 60,000 against the Bank Board forfeitures and none in favor of them.

The majority rule that savings depositors in a financial institution are able to control litigation allegedly for their benefit has been followed repeatedly in the U. S. Supreme Court and in our own Ninth Circuit Court of Appeals. It was so followed in Denicke, et al., v. Anglo-California Nat'l. Bank of San Francisco, 141 F. 2d 285 (CA-9, 1944) [Cert. denied 323 U. S. 739

9 L. ed. 592.] This was a derivative action by certain National Bank stockholders against the directors and managing officer of their bank for misuse of the bank's assets and property for the personal benefit of the directors and managing officer. The total amount sought was in excess of \$5,000,000.

About \$2,590,000 had been collected from certain of the directors and officers (45 Fed. Supp. 524, at 528). Settlements of the remaining litigation were offered for a total of \$400,000.

The management of the Bank had been changed. The new management and 95% of the votes of the total outstanding stock of the Bank approved the compromise. They asked the District Court's approval of the dismissal of the class actions and acceptance of the compromise. The original plaintiffs who had filed the successful class actions opposed the dismissal and appealed. There were over 1,000 stockholders, only two of whom were appellants.

Both this U. S. Court of Appeals for the Ninth Circuit and the Supreme Court, by denying certiorari, approved the majority rule of the 95% vote of the Bank's stockholders. In affirming this Court of Appeals for the Ninth Circuit said at pages 287-288:

" . . . after notice to all stockholders, a hearing, eventuating in the judgment appealed from, was had . . .

" . . .

"[3] Under all the circumstances we think it was primarily for the shareholders and the presently constituted authorities of the Bank, acting in good faith, to determine whether the best interests of that institution did not lie in the course they asked leave to follow. Cf. *Hawes v. Oakland*, 104 U.S. 450, 462, 26 L. Ed. 827. Out of more than a thousand shareholders only two, and those the appellants,^o

objected . . .

"[4,5] Appellants insist that the court lacked power to terminate the suit without their consent. Rule 23 of the Rules of Civil Procedure affords no ground for that view, and the California authorities, at least, are to the contrary. It is the rule in that state that the stockholder is permitted to sue 'simply in order to set in motion the judicial machinery of the court.' [Citing authority] . . . We are not aware of any federal law to the contrary, and in the present circumstances we think it appropriate if not obligatory on us to apply the local rule." (Emphasis added.)

"6

Denicke owned 1,600 shares of the common stock of the Bank and Doble 1,752 shares, out of a total of 410,000 shares of common and 1,925,000 shares of preferred outstanding."

Appellants insist upon forfeitures to take from some and give to other depositors stock that none of the savings depositors of Long Beach Federal will accept. None have joined appellants either in the Trial Court or on these appeals.

The U. S. Court of Appeals for the Third Circuit in Federal Home Loan Bank Board v. Greater Delaware Valley Fed. S. & L. Ass'n., 277 F. 2d 437 (1960), refused to nullify the conversion of Greater Delaware Valley Federal from a Federal to a State association because "no shareholder has joined" the Bank Board in that case.

This Ninth Circuit Court of Appeals should reject appellants forfeitures in which "no shareholder of Long Beach Federal has joined."

Congress in 12 U.S.C. §1464(i) spelled out in great

detail what was required of a Federal association which converted to a State association. Only " . . . 51 per centum of all the votes cast at such meeting, . . . " is required.

Bank Board approval is not one of such requirements.

The Court of Appeals for the Third Circuit said in 277 F. 2d 437, at page 440:

"[3] . . . Moreover, as the court below pointed out, during the consideration of this legislation Congress was apprized of the likelihood that an association, displeased by the course of Board monition, would seek to escape federal supervision by acquiring a state charter. Expressing this fear, the then Chairman of the Board recommended that the bill be amended to enable the Board to prevent such conversion. . . . "

Congress did not follow such recommendation and no such provision became law.

Appellants were denied by Congress the power they now urge this Court of Appeals to legislate for them. Not merely "51 per centum," but the entire body of all savings depositors of Long Beach Federal voted at their special meeting thanking the \$100,000 and over new savings accounts for becoming depositors and condemning as "arbitrary, unjust and illegal" the Bank Board's forfeitures. This majority rule by the savings depositors of the disposition of their own property was followed in the Greater Delaware Valley Federal case, 277 F. 2d 437, in the Third Circuit, and by this Ninth Circuit Court of Appeals in the Denicke v. Anglo-California Nat'l. Bank of S. F., 141 F. 2d 285, case.

Only appellant Bank Board's "supervision by blackmail" [Congressional Investigating Committee Report, page 42-44 hereof

for details] thwarts the repeatedly expressed unanimous will of all Long Beach Federal savings depositors.

The Trial Court heard testimony, received exhibits, considered cross-examination and argument by appellants on the right of appellee Shareholders' Protective Committee to continue its then 18 years of representation of all Long Beach Federal savings depositors. [TR 100-237; TR 102 Def's. Exhs. A, B, A, A-1, 2,3, B, B-1,2, C; Pl's. Exhs. 1, 2, 3, 4, 5, 6, 7, 8, 9-A, 9-B, 10, 10-A,B,C,D, 11, 11-A,B,C,D,E, 12, 13 14, 14-A,B,C, 15, 15-A,B;]

In its opinion (233 F. Supp. 578 at 590-591, Appx. Ia hereof) which constitutes the findings of the trial court in this case more than a printed page is devoted to the findings on the adequacy of appellee Shareholders' Protective Committee to represent the entire class of all savings depositors in Long Beach Federal.

Although appellant Savings and Loan Commissioner devotes 6 pages to his brief to attacking such findings and appellant Bank Board also attacks the District Court findings, none of the appellants support their attack with any record references to any evidence they offered to the Trial Court upon this matter. Nor do they comment in any way upon the holding of this Ninth Circuit Court of Appeals in Harris v. Palm Springs Alpine Estates, Inc., 329 F. 2d 909 (CA-9, 1964) cited and quoted repeatedly by the Trial Court in its opinion on this subject.

Federal Rules of Civil Procedure, Rule 52 reads in part:

table surplus. It is not necessarily for a class action that the persons representing the class shall have the same rights as one another; they may have unequal rights, or, indeed, they may have conflicting rights, [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909] but still be of a class [Chance v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 275, 23 Cal.Rptr. 761, 373 P.2d 849; Hink et al. v. Superior Court of Los Angeles County et al. (1962) 58 Cal.2d 921, 23 Cal.Rptr. 771, 373 P.2d 859]. Regardless of the amount of the deposit by any shareholder, or the date thereof, or whether or not the account was pledged, the thing all shareholders have in common is that they were depositors in Long Beach Federal Savings & Loan Association, under one common charter and one law authorizing the creating of the Association as a mutual institution, and received identical passbooks. Here, there are 60,000 shareholders; obviously so numerous as to make it impracticable to bring them all before the court. Here, there has been the greatest possible notice to all the shareholders of the position taken by the Association and the Committee, including

a copy of the Complaint in Action No. 63-1072-PH, sent to each by mail, together with an order to show cause, fixing a time and place to object, if any one cared to object. One person showed up and objected, but has proceeded no further, and the Court must conclude that he is, and all the other shareholders are, content to have the matter adjudicated with the present parties, under the pleadings framing the issues. One Ross and several others showed up and asked that they represent themselves as intervenors rather than have the Committee represent them, but each asked the same relief sought by the Committee, i. e., pro-rata distribution of the distributable assets as provided by the Statute, the charter, and the Settlement Agreement. Except for the intervenors, not a single shareholder has appeared in this or any of the three actions objecting to either the position taken by the Shareholders Protective Committee or the individuals composing it, or the position taken by the Association. The only one who is objecting is the Bank Board, and it has and claims to have no pecuniary interest whatsoever in any of the property in custody of the court, which is the subject matter of this action and which belongs to the shareholders of Long Beach. F.R.C.P. 23 "does not require that all the

ated, if there are substantial questions either of law or fact common to all." [Harris v. Palm Springs Alpine Estates, Inc. (9 Cir. 1964) 329 F.2d 909-914]. And the fact that no investor is objecting is a factor to be considered. Here, in this case, where process would be required to be served on approximately 60,000 persons, or separate suits filed, it is most appropriate to heed the admonition contained in the last cited case (p. 913) that: "Indeed, it has been suggested that 'the ultimate effectiveness of the federal remedies' in this area 'may depend in large measure on the applicability of the class action device,' and particularly of the 'spurious' class action provided by Rule 23(a) (3)." While that case holds that it is a question of fact to be tried, as to whether or not persons properly represent a class (with which there can be no quarrel), the undisputed facts related herein are sufficient for this court to form its judgment as a matter of law on the Motion for summary judgment. Moreover, it seems logical that "it is primarily for the shareholders" to determine what course they want to follow. [Denicke et al. v. Anglo-California Natl. Bank of San Francisco (9 Cir. 1944) 141 F.2d 285, Cert. den. 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592]. It cannot be overlooked that the Shareholders Protective Committee holds written proxies from more than a majority of the shareholders, and that all shareholders were advised of the position of the Shareholders Protective Committee and the Association, before the Merger Agreement was signed, and that the same Committee is and has been licensed by the State of California for 18 years, and that the Committee has participated on behalf of the shareholders in all of the long series of litigation and in the Settlement Agreement. I hold that the Shareholders Protective Committee properly represents all the shareholders as a class, under F.R.C.P. 23. In this connection, it must be kept in mind that the members of the Shareholders Protective Committee, and the intervenors are also suing *individually* as shareholders and depositors in the Association, and they have a right to have their individual rights declared, and in doing so, the court cannot escape the determination of the rights of all shareholders in order to determine the rights of one, so that any one not a party to this action could, under F.R.C.P. 71, enforce those rights "by the same process as if he were a party."

Neither appellants Bank Board nor Savings and Loan Commissioner see fit to tell this court that not one shareholder out of the 60,000 has come forward to join with either appellant on these appeals and this, despite 5 times repeated personal direct mailed notice, including a copy of the entire complaint filed by the Shareholders' Protective Committee with the U. S. Trial Court on behalf of all 60,000 Long Beach Federal savings depositors.

The position of appellants before this court is in direct defiance of the expressed command of Congress that all savings depositors shall share equally. It is also in direct defiance of the expressed wishes of all Long Beach Federal savings depositors at their mass meetings at the Long Beach Municipal Auditorium. The assembled Long Beach Federal savings depositors unanimously voted authority to their protective committee to file these actions and obtain the Trial Court's judgments.

XIV.

THERE IS NO LACHES OR ESTOPPEL BY APPELLEES

LONG BEACH FEDERAL OR ITS SHAREHOLDERS'

PROTECTIVE COMMITTEE

Appellants were fully informed at all times that appellees Long Beach Federal and its Shareholders' Protective Committee would sue to vacate appellants illegal and arbitrary forfeitures. [Pl's. Exh. 7-A-4-3 page 5; 12/9/63 - 10-A page 5] They also knew that such suits would follow and not proceed the merger. 99.4% of the votes cast were in favor of the merger. [Pl's. Exh. 12/9/63-8 page 13-16 and 3R-1136] But every ballot by which the proxies of Long Beach Federal's 60,000 savings depositors were voted contained the statement that the vote in favor of merger was cast in reliance upon the express provision of the merger agreement which reads:

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach, or any part thereof, incorporated herein. . . ." [Pl's. Exh. 12/9/63-4]

Such language originated with appellants but was placed in the merger agreement at the request of appellees. [3R-1135-1137]

All appellants approved the merger agreement with such language originated by them as part of such merger agreement. Thus was their express consent to these suits by appellees to contest the merger plan OR ANY PART THEREOF. [Pl's. Exh. 3-B; 3-D-4; 3-D-5]

It was therefore not necessary for appellees to swallow appellants illegal and arbitrary forfeitures OR lose the entire

merger. NOR was it necessary for appellees to enjoin or imperil their own merger by any litigation before the merger took place.

The merger took place September 10, 1963, at about 8:30 A.M. On that same day two of these actions were filed. No. 63-1072-P.H. was filed in the U. S. District Court. [1R-1; 2R-7; 3R-2 and 3R-17A, 17B]. No. 63-1230-P.H. was filed in the California Superior Court, Long Beach Branch as action No. 52 C-6367 therein. [2R-7] It became No. 63-1230-P.H. when it was removed by appellants Bank Board, et al., from said California Superior to the U. S. District Court.

The third action by appellee Equitable in interpleader was No. 63-1107-P.H. [3R-2 and 3R-17A, 17B] It was filed in the U. S. District Court September 17, 1963; just one week after the merger took place. Equitable deposited the entire 789,650 shares of stock "in dispute" with the U. S. District Court when the action No. 63-1107-P.H. was filed.[3R-2 and 3R-17A, 17B]

There can be no "laches" when two of the three Court actions were filed the same day as the merger and the third action was filed within a week after the merger.

XV.

APPELLANTS RELY ON OHIO AND OTHER CASES RE STABLE
AND SAFE SAVINGS ASSOCIATIONS. SUCH CASES CAN
HAVE NO APPLICATION TO THE WRECKED AND DAMAGED
APPELLEE LONG BEACH FEDERAL AND ITS PRECARIOUS
CONDITION AFTER 20 YEARS OF SEIZURES, LITIGATION
AND RUNS

On pages 59-65 of their brief and in their appendix,
appellants Bank Board, et al., quote extensively from In Re
Cleveland Savings Society, 25 Ohio Op. 2d 402, 192 N.E. 2d 518
(C.P. Cuyahoga County, 1961) [page 59 of appellants said brief] and
from In Re Springfield Savings Society, Case No. 60513, Court of
Common Pleas of Clark County, Ohio (1965) [page 60 of appellants
said brief]

But there can be no fair analogy between either the
Cleveland Savings Society case or the Springfield Savings Society
and appellee Long Beach Federal.

The vital distinctions between them can best be shown
by a comparison contrasting in parallel columns:

APPELLEE LONG BEACH FEDERAL	BOTH THE CLEVELAND SAVINGS SOCIETY AND SPRINGFIELD SAVINGS SOCIETY
1. Desperately needed tens of millions of rapid new savings deposits to restore public confidence and prevent a third panic and run which would have	1. Had no need or use for any new deposits. Needed no protection from panic or runs.

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

destroyed Long Beach Federal.

2. Had just been restored to its founding management from 2 years of Government seizure (1960-1962) and disastrous Government mismanagement. Had suffered in 1960-1961 a \$69,000,000 run of withdrawals by panic stricken depositors. The run was caused by Government seizures. The run took over 70% of the 1960 total deposits of \$96,000,000 and left only \$28,000,000.

3. Had no goodwill but obtained \$3,000,000 for restored goodwill caused by \$42,000,000 of new savings deposits.

4. Desperately needed \$5,000,000 of new tax shelter to avoid \$3,884,000 of possible income taxes on 1962

2. Had never been seized. Instead each had always been operated by its own management. Neither ever had a \$69,000,000 (or any) run of withdrawals. Neither had ever suffered any runs or seizures. Instead both had uninterrupted growth.

3. Had no need to restore lost goodwill. Had continuously established goodwill resulting from years of uninterrupted growth. Such goodwill could not be created by any amount of new savings deposits.

4. Had no need for any additional tax shelter of \$5,000,000 nor any damage award to shield from taxation.

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

\$5,000,000 damage award and
other assets.

5. Had 20 years of continuous litigation with U. S. Government repeated threats of seizures, runs and destruction. Millions of dollars of attorneys' fees incurred.

6. Had been twice seized and almost destroyed. First in 1946-48 with a \$10,000,000 run of withdrawals (almost 1/2 of the 1946 deposits of \$22,000,000). Next in 1960 with a \$69,000,000 run (70% of the 1960 deposits of \$96,000,000).

7. Had been threatened with a third Government seizure in 1949-1953 which was prevented only by a U. S. Court injunction and Congressional Investigations.

8. Had been three times vindicated by Congressional

5. Had no U. S. Government litigation, never threatened with seizure, no runs or destruction.

6. Had never had a seizure or run of withdrawals. Had grown without interruption.

7. Had never needed court or Congressional protection from Government seizures and destructive runs.

8. Had never had or needed Congressional Investigations or

Investigations which condemned the U. S. Government seizures.

9. Was required to retain \$3,000,000 of its assets for 10 years to indemnify U. S. agencies against damages they had incurred by seizures and mismanagement. \$42,000,000 of new savings deposits released this impounded \$3,000,000 for immediate distribution instead of being held for 10 years.

10. Had been spending hundreds of thousands of dollars for newspaper, T. V., radio and other ads to attract new savings deposits from every possible source. Had widely advertised its millions in new deposits as they came in so as to attract more deposits.

11. The \$42,000,000 of

protection against U. S. Government confiscation.

9. Had no impound of \$3,000,000 to be held for 10 years or any impound of any amount for any time, to be released by new savings deposits.

10. Each had kept its merger-conversion plans as a "well kept secret". Had not desired new deposits.

11. Every new deposit "diluted"

BOTH THE CLEVELAND SAVINGS SOCIETY
AND
SPRINGFIELD SAVINGS SOCIETY

APPELLEE LONG BEACH FEDERAL

new savings deposits increased and decreased both the total
by 10 times the total distri- distribution and all individual
bution to all savings savings depositors shares.
depositors new and old alike,
and increased distribution to
every individual savings
depositors share by 4 times.

CONCLUSION

The above comparison demonstrates the continuing errors
of appellants. They have blindly applied the procedures for a
solvent, prosperous and growing association's (Cleveland and
Springfield) merger to the desperate and precarious plight of
appellee Long Beach Federal which without \$42,000,000 of new
savings deposits could not have survived to merge with Equitable
and thereby obtain a \$9,500,000 surplus to distribute to all
including the new savings depositors whose deposits and faith
created the surplus.

XVI.

THE DISTRICT COURT HAS JURISDICTION OVER THE
CALIFORNIA SAVINGS AND LOAN COMMISSIONER TO
PREVENT HIM FROM VIOLATING THE U. S. CONSTITUTION,
FEDERAL STATUTES AND APPELLEE'S FEDERAL RIGHTS IN
THEIR FEDERAL SAVINGS AND LOAN ASSOCIATION

A. SUING THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER DOES
NOT MAKE THE STATE OF CALIFORNIA A DEFENDANT

The District Court in its opinion 233 Fed. Supp. 578

at 590 held:

"[16-18] The Eleventh Amendment does not permit a State official to divest one of rights federally granted or created. The rights of the shareholders in Long Beach were created by its Federally-granted charter. And a suit against an official of a State in such an instance (as is this) is not a suit against the State. [Reagan v. Farmers' Loan & Trust Co. (1894) 154 U.S. 362, 390-393, 14 S.Ct. 1047, 38 L.Ed. 1014; Sterling etc. v. Constantin et al. (1932) 287 U.S. 378, 393-394, 397-398, 53 S.Ct. 190, 77 L.Ed. 375; Ex Parte Young (1908) 209 U.S. 123, 159-160, 28 S.Ct. 441, 52 L.Ed. 714]. The property having been deposited in this court under the interpleader statutes, the Eleventh Amendment does not prevent the Federal court from declaring the rights and obligations of the parties, and enjoining the California Savings and Loan Commissioner from interfering with such declared rights. [In re Tyler (1893) 149 U.S. 164, 13 S.Ct. 785, 37 L.Ed. 689]. The State having consented to suit against its Savings and Loan Commissioner, it is unnecessary to discuss the proposition as to whether he is an indispensable party or a necessary party. Suffice it to say he is a proper party, and rightly so in this interpleader suit, equitable in nature, so that this court may finally and effectively dispose of the entire controversy which affects some 60,000 persons."

The District Court also made other holdings on this point.

Appellant California Savings and Loan Commissioner claims the State of California cannot be sued in Federal Court because of the Eleventh Amendment to the United States Constitution.

But the State of California is nowhere sued or named as a party in any of the three actions. Nor are those suits against the Savings and Loan Commissioner suits against the State of California.

The State of California will not gain or lose one cent of money or property by the 1,899 trial court judgments nor by any judgment given or refused by this United States Court of Appeals.

If the approximately 2.5 million ^{66/} of Equitable guaranteed stock held by the United States Courts is distributed equally and pro rata to all Long Beach shareholders as specified in the Association's Federal Charter, California gains or loses nothing.

Also if the pro rata shares of all Long Beach shareholders who borrowed on their savings accounts and all whose accounts are over \$10,000.00 each, are taken from them and given to other Long Beach shareholders as required by defendant Federal Home Loan Bank Board, et al., California gains or loses nothing.

In Johnson v. Lankford, 245 U. S. 541, 62 L. ed 460 (1918), plaintiff sued the banking commissioner of Oklahoma and his surety bonding company for violation of plaintiff's rights

under the U. S. Constitution and also under Oklahoma law. Plaintiff alleged that other depositors had been paid and he had been excluded from payment in violation of his Constitutional right to equal protection of the law. The suit was filed in the U. S. District Court. The banking commissioner contended the suit was prohibited by the 11th Amendment to the U. S. Constitution. The District Court agreed and dismissed. The U. S. Supreme Court reversed and said at U. S. page 545, L. ed. page 63:

" . . . The sole question for our consideration, then, is whether the cause of action stated is one against the state, of which the district court has no jurisdiction.

" . . . the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it, and makes the redress sought against him a claim against the state, and therefore prohibited by the 11th Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both.

and further at U. S. page 546, L. ed. page 463:

" . . . immunity from suit was a 'high attribute of sovereignty--a prerogative of the state itself--which cannot be availed of by public agents when sued for their own torts.' And it was further said: 'The 11th Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the state's citizens.' . . ."

In Griffin v. School Bd. of Prince Edward, 377 U. S. 218, 2 L. ed. 2d 256 (1964), the U. S. Supreme Court said at U. S.

page 228, L. ed. page 263:

"(c) It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex Parte Young*, 209 US 123, 52 L ed 714, 28 S Ct 441, 15 IRA NS 932 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment."

In McNeill v. Southern R. Co., 202 U. S. 543, 50 L. ed. 1142 (1905), the corporation commissioner of North Carolina was enjoined by the U. S. District Court from violation of laws of the United States. The corporation commissioner claimed immunity from suit under the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court affirmed the injunction and said at U. S. page 558, L. ed. page 1147:

"... But three questions are essential to be passed upon. They are: . . . Second. Whether, as to the individual defendants below, this cause in fact was a suit against the state of North Carolina. Third. Whether the order and decision of the corporation commission of North Carolina, and the statutes of that state upon which the same was based, were void because in conflict with the commerce clause of the Constitution and the act of Congress to regulate commerce."

And further at U. S. page 559, L. ed. page 1147:

"2. We think the real object of the bill may properly be said to have been the restraining of illegal interferences with the property and interstate business of the railway company, the asserted right to interfere, which it was the object of the bill to enjoin, being based upon the assumed authority of a state statute, which

the bill alleged to be in violation of rights of the railway company protected by the Constitution of the United States. In this aspect the suit was not, in any proper sense, one against the state. (Citing authorities)."

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014 (1894), the United States Supreme Court said at U. S. page 390-393, L. ed. page 1021-1022:

"... There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. . . .

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. . . . They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. . . .

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. . . ."

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property

rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. . . .

"We need not, however, rest on the general powers of a Federal court in this respect for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis county.' Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. . . .

". . .

". . . Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." [Emphasis added]

In Sterling v. Constantin, 287 U. S. 378, 77 L. ed 375 (1932), the Governor of Texas had called out the State militia to enforce Texas Railroad Commission orders limiting the amount of oil that could be produced from plaintiffs' oil wells. The U. S. District Court enjoined the Governor, Texas Railroad Commission,

and other Texas officials from enforcing said administrative orders. The State of Texas and its officials claimed, even as the California Savings and Loan Commissioner claims in our case, that suit in the U. S. Court was prohibited by the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court ruled otherwise and said at U. S. pages 393-394, L. ed. pages 382-383:

" . . . The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. (Citing 9 U. S. Supreme Court Decisions) . . .

" . . . The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case. . . ."

and further at U. S. pages 397-398, L. ed. page 385:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; . . .

" . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (art. 3, §2) and, so extending, the court has all the authority appropriate to its exercise. . . ."

and further at U. S. page 404, L. ed. page 388:

" . . . Complainants had a constitutional right

to resort to the Federal court to have the validity of the Commission's orders judicially determined. . . ." [Emphasis Added]

In Ex Parte Young, 209 U. S. 123, 52 L. ed. 714 (1908), the U. S. District Court enjoined the Attorney General of the State of Minnesota from enforcing unconstitutional laws of that State. The Attorney General claimed the action was one against the State of Minnesota and beyond the jurisdiction of the U. S. District Court because of the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court held otherwise and said at U. S. pages 159-160, L. ed. page 729:

" . . . The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants, is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. . . . If the question of unconstitutionality, with reference, at least, to the Federal Constitution, be first raised in a Federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts." [Emphasis added]

In Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209 (1947), plaintiffs were suing the Chairman and Members of the U. S.

Maritime Commission. The action was for the return of corporate stock owned by plaintiffs, but in the possession of the U. S. Maritime Commission. The District Court dismissed because the action was against the United States. But the U. S. Supreme Court reversed and said at U. S. page 738, L. ed. page 1216:

" . . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

B. THE STATE OF CALIFORNIA HAS CONSENTED TO SUIT AGAINST THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER

Just as in Reagan v. Farmers Loan & Trust Co., (supra, page 157 hereof), Texas had consented to suit against the Texas Railroad Commission, so California has consented to suit against the California Savings and Loan Commissioner.

California Financial Code, Section 5258, reads in part:

"§5258. Acts of commissioner subject to judicial review: Time for commencement of proceedings. Every order, decision, approval, certificate, license, permit, or the denial of any approval, certificate, license or permit, or other official act of the commissioner provided for in Articles 1, 2 and 4 of Chapter 3, Chapter 5, Sections 6450 to 6455, inclusive, and Article 1, Chapter 18, of this division is subject to judicial review in accordance with law. . . ."

Each of the Commissioner's actions, orders, permits,

and approvals were made and done by the Commissioner under the authority of California Financial Code sections expressly made judicially reviewable by said Financial Code Section 5258.

The "Order Approving Merger" [Plaintiff's Exhibit "3-B"] was made under the authority of Financial Code §9203 which is part of Chapter 18, Article 1, referred to in said §5258.

By the California Financial Code sections authorizing the merger of appellee Long Beach Federal a mutual Federal savings and loan association into appellee Equitable a California State association, the State of California expressly consented to Federal law including Federal judicial review in the Federal Courts.

California Financial Code Sec. 9203 reads:

"§9203. Merger or consolidation between domestic associations and federal associations permissible. Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them."

California Financial Code Sec. 9205 reads in part:

"§9205. Commissioner's approval required: Conformity with provisions of United States laws and regulations of Federal Home Land Bank Board required. Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, . . . and with respect to any constituent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations, and transfers."
[Emphasis added]

The laws of the United States require judicial review in the United States Courts of any merger of any Federal savings and loan association if the Federal association asks such judicial review.

12 U. S. C. 1464 (d) reads in part:

" . . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia."

The merger of appellee Long Beach Federal into appellee Equitable was admittedly a " . . . matter under this section [12 U.S.C. § 1464] or regulations made thereunder, . . ."

Two of the three actions filed in the U. S. District Court were expressly brought under said section 12 U. S. C. 1464 (d) (as well as other jurisdictional statutes). [1R 2-5; 3R 3-7]

The third action No. 63-1230-P.H. was originally filed in the California State Superior Court as No. SOC 6367 in the Long Beach Branch of said California Court. It was removed from said California State Court to the Federal Trial Court by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation pursuant to Federal law authorizing such removal 28 U. S. C. §1441-1442. [2R 1-184]

By such removal the Federal District Court acquired all

the jurisdiction of the California State Superior Court from which said action No. 63-1230-P.H. was so removed. Appellant California Savings and Loan Commissioner was made a party defendant in said removed action and judgment [2R 558-581; 2R 601-612] entered against him therein. [2R 914-915]

He admits, indeed he insists, he could have been sued in the California State Superior Court. But the Federal Court in a removed action acquires all jurisdiction of the State Court from which the action was removed.

In Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 47, (U. S. Supreme Court, 1901), the U. S. Supreme Court affirmed a judgment entered in the U. S. trial court after removal of the case from a State Court. The U. S. Supreme Court said at U. S. page 60, L. ed. page 749:

"This action was brought in the state court, and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit. . . ."

In Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239, 49 L. ed. 462 (U. S. Supreme Court, 1905), the U. S. Supreme Court said at U. S. page 250, L. ed. page 467:

". . . Whenever a right is given by the law of a state, and the courts of such state are invested with the power of enforcing such right, the proceeding may be removed to a Federal court if the other requisites of removability exist. . . ."

and further at U. S. page 255, L. ed. page 469:

". . . In the exercise of that power a circuit court of the United States, sitting within the limits of a state, and having jurisdiction of the parties,

is, for every practical purpose, a court of that state. . . . It is not to be implied from the statute in question that the state intended to exclude, or supposed that it could exclude, from the Federal courts, jurisdiction of any suit to which the judicial power of the United States extended."

In Freeman v. Bee Machine Co., 319 U. S. 448, 87 L. ed. 1509 (U. S. Supreme Court, 1942), the U. S. Supreme Court reversed the lower courts for not permitting an amendment in a removed action. The U. S. Supreme Court said at U. S. page 452, L. ed. page 1513:

" . . . The jurisdiction exercised on removal is original. . . . The forms and modes of proceeding are governed by federal law (citing authorities) . . . it preserves to the federal District Courts the full arsenal of authority with which they have been endowed. Included in that authority is the power to permit a recasting of pleadings or amendments to complaints in accordance with the federal rules. (citing authorities)"

The stock permit "Permit No. LA-171" (Plaintiff's Exhib "3-C2") was made under the provisions of California Financial Code §6450 to §6455. Said sections are specifically named in said §5258 providing for judicial review.

Financial Code §11000, reads:

"§11000. Rights, powers, and privileges available to federal associations and shareholders under laws of State. Every federal savings and loan association incorporated under the provisions of the Home Owners' Loan Act of 1933, as now or hereafter amended, and the holders of shares or share accounts issued by any such association, respectively, have all the rights, powers, and privileges, and are entitled to the same exemptions and immunities granted, respectively, to savings and loan associations organized under the laws of this State and to the holders of investment certificates, membership shares, or guarantee stock of domestic associations."

The State of California and the California Savings and Loan Commissioner both knew that in dealing with Long Beach Federal Savings and Loan Association they were acting upon the Federal rights of its over 60,000 savings depositors. Such Federal rights arose under the Long Beach Federal charter, Acts of Congress, and Federal regulations. Federal questions requiring decisions by Federal Courts would of necessity arise in any merger of Long Beach Federal Savings and Loan Association into Equitable Savings and Loan Association, a California State savings and loan association. By California Financial Code §9203 and 9205 such a merger was authorized and required ". . . to be made in conformity with the provisions of the laws of the United States. . ." and by Financial Code §11000 the Federal association and the holders of its share accounts were given the same rights of judicial review against the Savings and Loan Commissioner including judicial review in the Federal Courts as were given to domestic associations and their depositors, investors and members.

The State of California submitted itself to the paramount Federal authority when it provided for the merger of appellee Long Beach Federal into appellee Equitable, a California state association. The enabling statutes, California Financial Code sections 9203 and 9205 expressly enact that all such mergers ". . . be made in conformity with the provisions of the laws of the United States, . . ."

By such enactment the State of California submitted itself to federal law and its officers, including appellant Savings and

Loan Commissioner to federal judicial review.

In Parden v. Terminal R. of Alabama Docks Dept., 377 U. S. 184, 12 L. ed. 2d 233 (1964) the State of Alabama sought to escape the liability to federal law by pleading the Eleventh Amendment to the U. S. Constitution. But the U. S. Supreme Court held that when the State of Alabama contacted federal agencies it became subject to suit in the federal courts. The U. S. Supreme Court said at U. S. page 196, L. ed. page 242:

" . . . But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. (Citing Authorities) . . . "

Appellant Savings and Loan Commissioner must believe the above decision correct as he cites it on pages 13-14 of his brief.

The Eleventh Amendment and the Fourteenth Amendment are both equally part of the U. S. Constitution. The Fourteenth Amendment reads in part:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Emphasis added]

The Eleventh Amendment does not and cannot confer upon Appellant Savings and Loan Commissioner immunity from suit when he violates the U. S. Constitution or federal rights conferred upon appellees under federal statutes in their federal savings and loan association.

Such "judicial review in accordance with law" (California Financial Code §5258) is a broad and comprehensive consent to suit in any court, State or Federal. It cannot be distorted into a limited consent for suit only in California State Courts. When the California Legislature wished to restrict suits against the Savings and Loan Commissioner to California State Courts it has said so positively and explicitly.

As examples, when the Commissioner seizes a California State association provision is made for the Association to seek court action. Financial Code §9003 reads in part:

"§9003. When association permitted to commence action to enjoin further proceedings by commissioner: Authority of superior court. Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 30 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, . . ." [Emphasis added]

When the California Legislature wanted final decisions upon the first hearing of a matter concerning savings and loan associations it explicitly so provided. Financial Code §7404 reads:

"§7404. Same: Review by supreme Court: Modification only where abuse of discretion. An association or any of its certificate holders or shareholders aggrieved by the action of the commissioner in determining the rates of return on shares and investment certificates may at any time within 10 days after the determination of the rates apply to the Supreme Court for a review of the commissioner's determination. The commissioner's determination shall not be set aside or modified unless the court finds that the commissioner in making his determination committed an abuse of discretion." [Emphasis added]

But in the provisions affecting both Federal and State savings and loan associations the California Legislature in its wisdom has provided not for review in the Superior Court, nor in the Supreme Court, nor limited to any State Court, but instead for "judicial review in accordance with law" (California Financial Code §5258).

The U. S. Supreme Court in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 38 L. ed. 1014 (1894), interpreted a much more restrictive provision of the law of Texas. The U. S. Supreme Court said at U. S. page 392, L. ed. page 1021:

" . . . Section 6 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis county. Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. . . ."

The California Savings and Loan Commissioner has expressly consented that the U. S. District Court and this U. S. Court of Appeals may adjudicate the disputed ownership of the equitable guarantee stock in the possession of the Clerk of said court. The Order Approving Merger [12/12/63-12 Plaintiff's

Exhibit "3-B"] filed as part of said Commissioner's motion to
dismiss reads in part:

"6. . . . EQUITABLE shall make distribution of the guarantee stock of EQUITABLE to the shareholders of LONG BEACH FEDERAL in accordance with the terms of the 'Merger Agreement' dated June 12, 1963, and in accordance with the lawful requirements of the Savings and Loan Commissioner including the terms of the stock permit respecting said guarantee stock, but subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Emphasis added]

Further the permit of said Commissioner for Equitable to issue
said stock [Plaintiff's Exhibit "3-C-2"] reads in part:

"Authorization: Upon . . . consummation of the merger in accordance with the provisions of the Order Approving Merger by the Savings and Loan Commissioner of the State of California dated August 28, 1963, Equitable Savings and Loan Association is authorized to issue 791,650 shares of its One Dollar (\$1.00) par value guarantee stock to the withdrawable shareholder members of Long Beach Federal Savings and Loan Association in accordance with the terms of Articles VII and VIII of the Merger Agreement of June 12, 1963. . . ."

[Emphasis Added]

Part of which reads:

". . . .

"This Agreement is not intended to prohibit any shareholder member of Long Beach from taking appropriate action to exercise such rights, if any, which he may have to contest the merits or validity of the plan of dissolution of Long Beach. or any part thereof, incorporated herein." [Plaintiff's Exhibit 7-A-4-3, pg. 47]

The affidavit of T. A. Gregory, President of Long Beach Federal [2R 701-702; 3R 625-626] discloses that the California Savings and Loan Commissioner and his representatives were informed that Federal Court actions were to be filed by the Shareholders' Protective Committee of Long Beach Federal by Long Beach Federal, and by Equitable Savings and Loan Association and that such actions would include U. S. District Court actions in interpleader with the Equitable stock deposited in Federal Court in such actions.

C. THE UNITED STATES COURT WHICH HOLDS PHYSICAL POSSESSION OF \$9,500,000 OF EQUITABLE GUARANTEE STOCK DECIDES ALL QUESTIONS CONCERNING THAT STOCK

The California Savings and Loan Commissioner on the 8th day of August, 1963, made his "Order Approving Merger". Equitable Savings and Loan Association thereby became obligated to issue 791,650 shares of its guarantee stock to Long Beach Federal savings shareholders. But by the express terms of paragraph 6, page 3, of said Order [Plaintiff's Exhibit "3-B"; 3R 686-688] the issuance of said stock was:

"6. . . . subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute." [Emphasis added]

Equitable was sued as a defendant in action No. SOC-6367

in the California Superior Court by Elliott, et al., as the Shareholders' Protective Committee of Long Beach Federal [2R 7 and 13]. Equitable as plaintiff thereupon filed its own action, No. 63-1107-P.H., in interpleader in this U. S. District Court. With said complaint Equitable deposited with the Clerk of this U. S. Court its stock certificate for said 791,650 shares. [3R 17A-17B]

Thereby this U. S. District Court became in action 63-1107-P.H. "a court of competent jurisdiction which may otherwise control the distribution of that number of shares of Equitable Guarantee Stock as to which ownership and entitlement are in dispute."

Later defendants Bank Board and Insurance Corporation removed from the California Superior Court action No. 800-6367 commenced in that Court by the Shareholders' Protective Committee of Long Beach Federal. On removal said action became No. 63-1230-P.H. in this U. S. District Court. [2R 1 to 184] By orders made in all three actions (No. 63-1230-P.H., No. 63-1107-P.H. and 63-1072-P.H.) this Court has made "lawful orders" disposing of said shares of stock.

Thereby the U. S. District Court took into its physical possession and custody all of said Equitable guarantee stock.

As the court having actual and "lawful" physical possession and custody of said Equitable stock, said U. S. District Court is the only court authorized to make decisions concerning said stock and its distribution.

In Ex Parte Tyler, 149 U. S. 164, 37 L. ed. 689 (1893),

a State officer attempted to interfere with the possession of property held by Federal Receiver. The U. S. District Court promptly enjoined such interference. The State officers objected that such was a suit against the State and prohibited by the 11th Amendment to the U. S. Constitution. The U. S. Supreme Court rejected this contention and said at U. S. page 186, L. ed. page 696:

" . . . ' . . . and when one [court] takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.' . . . "

and at U. S. page 189, L. ed. page 697:

" . . . The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a state does not involve a question of power."

and further at U. S. page 190, L. ed. page 698:

" . . . where a suit is brought against defendants who claim to act as officers of a state and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the [11th] amendment, an action against the state."

This Ninth Circuit Court of Appeals has repeatedly affirmed the power of the Federal Courts to enjoin California State

officials from interfering with property in the possession of said Federal Courts. Such is held not to be a suit against the State of California.

In California State Board of Equalization v. Goggin, 191 F. 2d 726 (CA-9, 1951) [Cert. denied 342 U. S. 909, 96 L. ed. 680] this Ninth Circuit Court of Appeals affirmed an injunction to prevent California state interference with a Federal Court's disposition of assets in the custody of the Federal Court. Our Ninth Circuit Court of Appeals said at page 728:

" . . . The process of dealing with state tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state. Gardner v. New Jersey, 1947, 329 U. S. 565, 67 S.Ct. 467, 91 L.Ed. 504."

and further at page 730:

" . . . But no state is empowered to levy taxes upon the process of the courts of the United States or to impede the officers of court in an essential judicial function. . . . The Court had a right to protect its own officers in the discharge of their duties laid down by Congress. Oklahoma v. Texas, 266 U.S. 298, 45 S.Ct. 101, 69 L.Ed 296 Id., 268 U.S. 472, 45 S.Ct. 609, 69 L.Ed. 1057." [Emphasis added]

In California State Board of Equal. v. Coast Radio Prod. 228 F. 2d 520 (CA-9, 1955) this Ninth Circuit Court of Appeals again made the same holding at page 524 and said:

" . . . Nor, as appellant urges, does this proceeding constitute a suit against the state so as to come within the purview of Section 6, Art. XX of the California Constitution,¹⁴ since:

"The process of dealing with state tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state."¹⁵

- "14. . . .
"15. California State Board of Equalization
v. Goggin, 9 Cir., 1951, 191 F.2d 726, 728."

Appellee Equitable deposited the \$9,500,000 ^{67/} of

Equitable stock with the Clerk of the District Court in interpleader in action No. 63-1107-P.H., appeal No. 20522. Thereby said stock became in the custody of said Federal Court.

Under the Federal interpleader statute 28 U.S.C. §2361:

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunctions permanent, and make all appropriate orders to enforce its judgment." [Emphasis added]

D. IT IS NOT NECESSARY TO NAME THE CALIFORNIA SAVINGS AND LOAN COMMISSIONER AS A PERSONAL DEFENDANT.

In most of the authorities previously cited, such as Land v. Dollar, 330 U. S. 731, 91 L. ed. 1209 (1947), Ex Parte Young, 209 U. S. 123, 52 L. ed. 714 (1908), and others, the actions were against the State or Government officials in their official capacities. But whatever may have been the rule under prior law, Federal Rules of Civil Procedure, Rule 25, was amended in 1961, by adding a new paragraph (d) (2) which reads:

"(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added."

There have been three different California Savings and Loan Commissioners in office since 1963. A fourth new commissioner will take office in 1967.

E. THE COMMISSIONER'S AUTHORITIES APPLY ONLY TO ACTIONS TO RECOVER MONEY OR PROPERTY FROM THE STATE AND DO NOT APPLY TO OUR THREE CASES.

The Savings and Loan Commissioner's attorney cites numerous cases that a State cannot be sued in the U. S. Courts without the State's consent.

In every case so cited, the State's money or property was directly involved by the judgment sought. In 6 of the cases the State itself was sued and named as a party.

Each case sought to compel payment of State money or property from State officers to plaintiffs or to prevent collection of money by the State. All sought judgments requiring the State to pay or refund money or property.

None of these decisions can have any application to our cases.

California under no circumstances can own or claim any of the Equitable guarantee stock in the registry of this U. S. Court. California will not be one cent richer or poorer regardless of who among the thousands of Long Beach Federal savings shareholders gets, or is refused, judgment for the Equitable stock held by the Clerk of the U. S. District Court.

Our cases are decided by the line of U. S. Supreme Court decisions which hold that Government officers (State or Federal) who violate the U. S. Constitution cannot claim "sovereign immunity" as a defense.

Neither "sovereign immunity" nor the Eleventh Amendment can authorize a State official to violate both the State and Federal Constitutions by taking the property of one group of Long Beach Federal savings depositors and giving it to another group, contrary to Acts of Congress and the Federal Charter of said Association.

F. APPELLANT CALIFORNIA SAVINGS AND LOAN COMMISSIONER
MAKES CLAIMS ON APPEAL CONTRARY TO HIS ANSWERS TO
THE TRIAL COURT.

On page 24 and elsewhere in his opening brief appellant California Savings and Loan Commissioner claims only \$2.5 million (205,829 shares) of Equitable stock instead of the entire \$9.5 million (791,650 shares) are "in dispute" in these actions. He claims his consent to suit contained in his order approving merger is limited to the 205,829 shares. His order reads in part:

"' . . . subject to the lawful orders of any court of competent jurisdiction which may otherwise control the distribution of that number of said shares of guarantee stock of EQUITABLE as to which the ownership and entitlement are in dispute.'" [Plaintiff's Exhibit "3-B" and 3R-686-688]

But appellee Equitable was sued by appellee Shareholders'

Protective Committee for the entire 791,650 shares. And Equitable as plaintiff deposited the entire 791,650 shares in the U. S. District Court in interpleader. ^{68/}

Appellee Equitable as plaintiff in case No. 63-1107-F.M. sued all defendants for declaratory relief as to the entire 791,650 shares. Equitable's complaint was served on the Commissioner. His answer reads (a) on page 8, lines 1 through 4 [3R-681 and 684]:

" . . . admits that rights of former shareholder members of Long Beach to distribution of 791,650 shares of plaintiff's guarantee stock, said to have a value of \$9,500,000 are involved in this litigation; . . . "

And further (b) on page 11, lines 5 through 8 [3R- 681 and 684]:

" . . . admits that a controversy exists between some of the parties hereto as to the distribution of the 791,650 shares of Equitable stock said to have a value of approximately \$9,500,000, . . . "

After these admissions no doubt can exist that 791,650 not 205,829 are the shares "in dispute". This mis-statement in said appellant's brief that "only 205,829 shares are in dispute" demonstrates the errors of his elaborate attempts to confuse the judgments of the Trial Court disposing of stock. All stock was in dispute. All stock was in court subject to the Court's orders. All stock yet held by Equitable as an elisor of the court yet remains subject to court orders.

^{68/} Such deposit was made by a single stock certificate in favor of "All Savings Shareholder Members Of Long Beach Federal Savings and Loan Association As Their Respective Shares And Rights May Be Finally Decided By Final Judgment". [3R-17-A, 17-B]

The October-December, 1963 distribution of 585,821 shares pursuant to stipulation and consent order resulted from prior orders to show cause issued by both State and Federal Courts and served upon appellants Bank Board, et al. [3R 180-190, 1R 204-213, 2R 260-270]

Appellants sought desperately to avoid or delay hearings on said orders to show cause. [Transcript - October 21, 1963, Pgs. 1-32] When unable to do so appellants conceded and stipulated to the 1963 distribution of \$7,000,000 (585,821 shares).

Then only did the "dispute" as to the 585,821 shares end and such shares became not in dispute.

However, appellants' demands that this Court require Equitable to divest itself of Long Beach Federal's assets and to reconstitute.^{69/} Long Beach Federal places the entire 791,650 shares again "in dispute". It might be necessary to call back some or all of the 585,821 shares already distributed if Long Beach were to be reconstituted. How this could be done after distribution of most of said 585,821 shares among 60,000 Long Beach Federal savings depositors is not discussed by appellants.

Yet the California Savings and Loan Commissioner on page 12 of his brief "adopts the appellate brief filed in these cases by appellants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation."

Appellant Commissioner's brief is also misleading on page 30 where he states "As of April 30, 1962, Long Beach Federal

^{69/} Opening Brief of appellants Bank Board, et al., at pages 43 and 39, etc.

had in excess of \$38 million in cash on hand and in banks. . . . "

[Plaintiff's Exhibit "6", tab 4/30/62]

The same exhibit shows that Long Beach Federal received over \$38,000,000 in new deposits in April.

Without such new deposits there would have been NO CASH in the Association by the end of April. Had such condition existed the resulting run would have closed Long Beach Federal forever.

Appellant Bank Board's brief is equally misleading on page 52, Footnote No. 38, where it speaks of Long Beach Federal's "liquidity ratio". Such ratio was after Long Beach Federal received \$38,000,000 of new savings deposits in April, 1962. An increase from about \$30,000,000 to \$68,000,000 in one month is bound to result in "extraordinary high ratio of liquidity". The new savings deposits alone saved Long Beach Federal from financial ruin.

CONCLUSION TO THIS POINT

The California Savings and Loan Commissioner was made a party defendant in these actions to obviate the objection made by the Federal defendants that said Commissioner was an absent but "indispensable party."

The State of California has consented that said Commissioner may be sued for "Judicial review in accordance with law". The Commissioner himself by his Order Approving Merger

and by his Stock Permit has submitted to "the lawful orders of any Court of competent jurisdiction which may otherwise control the distribution of . . . said guarantee stock of Equitable".

The then (1963) Commissioner and his then representatives knew when they made said Order Approving Merger that Federal Interpleader as well as State court actions were expected. The U. S. District Court having physical possession of the stock certificates issued by Equitable certainly has jurisdiction of the Savings and Loan Commissioner of California under these circumstances.

XVII.

SUMMARY JUDGMENT WAS A PROPER METHOD
FOR THE TRIAL COURT TO DECIDE THE CASE.

No appellant raises any question in any of their specifications of error or otherwise, that the Trial Court should not have decided the case upon summary judgment procedure.

Appellants Federal Home Loan Bank Board, et al., at page 23 of its opening brief as specification of error "j" assert that the District Court erred in not granting summary judgment in favor of the Board.

Specification "i" on the same page asserts that the Court erred in granting summary judgment against the Board. But no claim is made anywhere in any of any appellant briefs that there were any disputed issues of fact.

Appellant Savings and Loan Commissioner "adopts" the briefs of appellant Bank Board, (at page 12 of his opening brief).

The basic facts upon which the District Court rendered its summary judgment were not only undenied but were matters of judicial notice which were, and are, undeniable. Both the Trial Court and this Court of Appeals take judicial notice and knowledge of the more than 20 years of prior litigation between these same parties. Such judicial notice and knowledge includes both the Court and Congressional findings, evidence, testimony, exhibits, hearings, Congressional Committee Investigations, reports and

proceedings. 70/

Summary judgments based upon such judicial notice and knowledge have been repeatedly used to determine complicated banking and financial litigation where there are no disputable facts and issues of law alone are presented.

Among such cases are:

First National Bank in Billings v. First Bank Stock Corp., 306 F. 2d (CA-9, 1962) was an action by four banks against a Bank Holding Company and several other banks to prevent a sixth bank from violating the Bank Holding Act by opening a branch. The Trial Court decided the entire case on motion for summary judgment. This Court said at page 939:

"The judgment dismisses the action on the merits, upon appellees' motion for summary judgment on both counts. The decision was based on affidavits, a pre-trial order embodying some 77 paragraphs of agreed facts, depositions of certain officers of Midland, taken by appellants, and testimony of the president of one of the plaintiff banks. The court summarized the facts in its opinion, determined that there is no genuine issue of material fact, and entered judgment accordingly. We are affirming."

And further at page 942:

". . . In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it.

" . . .

"Is there anything in the record showing that there is a 'genuine issue as to any material fact' relating to this contention

70/ See footnote 12 page 11 hereof for citations regarding judicial knowledge and notice.

(Rule 56 (c), F. R. Civ. P.)? We find nothing so showing. . . ."

And further at page 943:

"Under these circumstances, unless appellants made an evidentiary showing which, if accepted, could be held by a trier of fact to permit a contrary conclusion, there was no genuine issue of fact to be tried. Under Rule 56, F.R.Civ.P., if defendants make a showing that would entitle them to judgment unless contradicted, the plaintiffs then have a duty to show that such contradiction is possible; they cannot rest upon the allegations of their complaint. The whole purpose of Rule 56 would be frustrated if they could.

"Here, no such showing was made by appellants. . . .

" . . . If they had other evidence, the time had arrived to produce, not necessarily all of it, but a least enough to show a genuine issue of fact to be tried."

In U. S. v. Mt. Vernon Milling Co., 345 F. 2d 404 (CA-7, 1965), the United States failed to make sufficient opposition to a motion for summary judgment against it. The Trial Court entered summary judgment and the United States Court of Appeals for the Ninth Circuit affirmed and said at page 404:

"Plaintiff-appellant, the United States of America, brought this action on behalf of the Commodity Credit Corporation, hereinafter sometimes called 'CCC', to recover damages"

And further at page 405 and 406:

"Relying on the pleadings, including its own answer denying that plaintiff was damaged as a result of defendant's conduct; answers to interrogatories; and affidavit of Dr. Ferrari, [Defendants moved for Summary Judgment]

" . . .

" . . . At this point in the proceedings, something more was required of the plaintiff beyond bare allegations and conclusions of its complaint to show the existence of an issue as to a material fact to prevent grant of a motion for summary judgment. First National Bank in Billings v. First Bank Stock Corp., 9 Cir., 1962, 306 F.2d 937, 943.

"[3] Contentions dispositive of the case were not in dispute. The District Court correctly concluded that there was no genuine issue as to any material fact necessitating a trial. Charles A. Lawes Co. v. Detex Watchclock Corp., 7 Cir., 1962, 300 F. 2d 393, 395. To oppose the motion successfully, plaintiff was obliged to come forward with evidence to show the existence of a conflict. Repsold v. New York Life Ins. Co., 7 Cir., 1954, 216 F. 2d 479, 483; Robson v. American Casualty Co. of Reading Pa., 7 Cir., 1962, 304 F. 2d 656."

And further at page 407:

"[4] Intangible speculation does not raise an issue of material fact. Chesapeake & Ohio Ry. Co. v. International Harvester Co., 7 Cir., 1959, 272 F. 2d 139, 142."

Appellant's affidavits re summary judgment failed completely to show any personal knowledge of any affiant which would be admissible in evidence.

Federal Rules of Civil Procedure 56 (e) reads in part:

"Rule 56.

"SUMMARY JUDGMENT

" . . .

" (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . ."

None of the affidavits state or show that any of the affiants is competent to testify on the matters stated therein. Appellant Savings and Loan Commissioner's affidavit was sworn to by the Commissioner who was not even in office at the time of the matters related in his affidavit. Nor can appellants rely upon the affidavit of their attorney Wilfand.

Similar affidavits have been held valueless on a Motion for Summary Judgment.

In Hoston v. J. R. Watkins Company, 300 F. 2d 869 (CA-9, 1962) the U. S. Court of Appeals for the Ninth Circuit said at page 870:

" . . . Watkins' affidavit in support of the motion does not comply with Rule 56 (e), F. R. Civ. P. It was made by Watkins' counsel, who obviously did not have personal knowledge of most of the things that he referred to, and whose testimony would not have been admissible in evidence at the trial. . . ."

In Chambers v. United States, 357 F. 2d 244 (CA-8, 1966), the 8th Circuit Court of Appeals approved the above decision of this 9th Circuit Court of Appeals and said at page 228:

"[5] The statement of the Assistant United State Attorney, based as it is upon information furnished by others, obviously does not comply with Rule 56 (e) and does not constitute admissible evidence. It is, therefore, not entitled to and will be given no consideration here. Hoston v. J. R. Watkins Co., 300 F. 2d 869, 870 (9th Cir. 1962)."

In Paramount Pest Control Service v. United States, 304 F. 2d 115 (CA-9, 1962) the Court of Appeals for the Ninth Circuit said at pages 116 and 117:

" . . . Rule 56 (e), Federal Rules of Civil Procedure, 28 U.S.C.A., permits the use of affidavits in support of or in opposition to a motion for summary judgment, but also requires that the facts stated in them be admissible in evidence upon a trial. Obviously then, it was incumbent upon the court to determine whether the proffered proof would be admissible in evidence, and if it clearly infringed upon the parol evidence rule then there was no alternative save to reject it. Ford v. Luria Steel & Trading Corp., 192 F. 2d 880 (8th Cir. 1951); . . ."
(Emphasis added)

Federal Rules of Civil Procedure, Rule 56 (e) further

reads in part:

" . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963."

Appellants failed to show any facts or testimony which could create any genuine issue of fact for trial.

The real issues of these appeals are, can appellants violate the act of Congress, the Settlement Agreement, and appellee Long Beach Federal's Charter which all require equal and pro rata distribution among all Long Beach Federal savings depositors.

Appellants insist upon an unequal and preferential distribution forfeiting some depositors and giving such forfeited deposits to other favored depositors in violation of the foregoing.

CONCLUSION

The U. S. Trial Court has ruled appellants' secret and ex post facto forfeitures and penalties "are illegal and void, and that the action of the Bank Board in 'insisting' on them as a condition of the merger was arbitrary and contrary to, and without authority in, law." [233 F. Supp. 578, at 598 (Appx. I-a hereof.)] This ruling is by the same Trial Judge who has heard these (and prior) cases between appellants and appellees for over 20 years. The U. S. Trial Court, in hearing and denying appellants' request for enforcement of their forfeitures, took testimony and received evidence. He also considered thousands of pages of exhibits, Congressional investigations, sworn testimony of appellants' chairman, Board members and counsel. He also considered the hundreds of pages of court reporters' transcripts of the mass meetings of appellee Long Beach Federal savings depositors held in the Long Beach Municipal Auditorium. He had before him hundreds of pages of correspondence signed by appellants and appellees [Plaintiff's et al. Exhibits 21-A1 thru 72E]. From all this mass of evidence as well as affidavits for summary judgment, he made his findings and decision.

That no savings depositor will accept appellants' forfeitures nor objects to the Court's decision demonstrates its justice and fairness.

The gross inequity of appellants' secret forfeitures and penalties is demonstrated by the refusal of all Long Beach

Federal savings depositors who might benefit thereby to accept ^{71/}any of the forfeited stock. None have joined with appellants in these appeals.

The Bank Board has shown this Court of Appeals no reason or justification for excluding any shareholder from equal and pro rata distribution.

In Joint Anti-Fascist Refugee Com. v. McGrath, 341 U. S. 123, 95 L. ed. 817 (1951) Mr. Justice Frankfurter said in his concurring opinion at page 171 U. S., 854 L. ed.:

" . . . 'The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.' [Citing authorities] Appearances in the dark are apt to look different in the light of day.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights . . . "

In Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220 (1886), the U. S. Supreme Court said at U. S. page 370, L. ed. page 226:

" . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

and further at U. S. page 373, L.ed. page 227:

". . . and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

In Ochoa v. Hernandez Y Morales, 230 U. S. 139, 57 L.ed. 1427 (1913), the U. S. Supreme Court said at U. S. page 161, L.ed. page 1437:

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled useages and modes of procedure, and without notice or an opportunity for a hearing." [Emphasis added]

Appellants have shown no basis whatsoever for reversal of any 1899 judgments made and entered by the District Court. All said 1899 separate judgments should be affirmed.

Respectfully submitted,

CHARLES K. CHAPMAN

CHARLES K. CHAPMAN, Attorney for Appellee Long Beach Federal Savings and Loan Association.

GEORGE W. TRAMMELL

GEORGE W. TRAMMELL, Attorney for Shareholders' Protective Committee.

REFERENCE TO APPENDIX I - II - III

Appellees' Appendix I, Appendix II, and Appendix III are each separately bound under separate covers.

Appendix III is the 1960 Report of the Congressional Committee's Investigation of Appellants' seizure of Long Beach Federal Savings and Loan Association.

Appendix I contains, among other things, a printed and bound copy of the opinion of the District Court, 233 F. Supp. 578 attacked by these appeals. A complete index of Appendix is page (i) thereof.

Appendix II contains, among other things, the more than 100-page class action Judgment containing 1899 separate judgments entered by the Trial Court in favor of the several thousand forfeited savings depositors.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules; except that it exceeds 80 pages in length. Application for leave to file it notwithstanding is made separately.

CHARLES K. CHAPMAN

CHARLES K. CHAPMAN, Attorney for
Appellee Long Beach Federal Savings
and Loan Association

FEB 10 1967

Nos. 20378, 20447 and 20522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL HOME LOAN BANK BOARD,
ET AL.,

Appellants,

vs.

SIDNEY ELLIOTT, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(NOW CENTRAL DISTRICT OF CALIFORNIA)

BRIEF FOR INTERVENOR N. JOSEPH ROSS

FILED

NOV 23 1966

WM. B. LUCK, CLERK

PACHT, ROSS, WARNE, BERNHARD
& SEARS
HARVEY M. GROSSMAN
Century City
Suite 500 Gateway East Bldg.
Los Angeles, Calif. 90067

I N D E X

	<u>Page</u>
PRELIMINARY STATEMENT	2.
ARGUMENT	3.
I THE RIGHT OF PRO RATA DISTRIBUTION ANTE-DATED THE MERGER AGREEMENT AND COULD NOT BE DESTROYED BY THAT AGREEMENT	3.
A. The Charter	4.
B. The Settlement Agreement	9.
C. Basic Federal Policy	12.
II APPELLANTS' NOTIONS OF "FAIRNESS" ARE IRRELEVANT HERE.	14.
III THE SHAREHOLDER MEMBERS OF LONG BEACH WERE NOT NOTIFIED OF ANY CONTEMPLATED FORFEITURE AT THE TIME OF THEIR DEPOSITS; THE ATTEMPTED FORFEITURE IS THERE- FORE VIOLATIVE OF DUE PROCESS	15.
CONCLUSION	17.

CITATIONS

	<u>Page</u>
<u>Hamilton National Bank v. District of Columbia, 156 F.2d 843, 846 (C.A. Dist. of Col., 1946),</u>	5
<u>Huntington v. National Savings Bank, 96 U.S. 388 (1878)</u>	5
<u>Intermountain Building & Loan Ass'n. v. Gallegos, 78 F.2d 972 (C.A. 9, 1935)</u>	5
<u>Treigle v. Acme Homestead Association, 297 U.S. 189 (1936)</u>	5
 Authorities:	
12 USC, Section 1464 (a)	12

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20378

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20447

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

SIDNEY ELLIOTT, ET AL.,
Appellees

No. 20522

FEDERAL HOME LOAN BANK BOARD, ET AL.,
Appellants

v.

EQUITABLE SAVINGS & LOAN ASSOCIATION, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(NOW CENTRAL DISTRICT OF CALIFORNIA)

BRIEF FOR INTERVENOR N. JOSEPH ROSS

Preliminary Statement

Intervenor N. Joseph Ross (hereinafter "Ross") one of the shareholder members of Long Beach Federal Savings and Loan Association (hereinafter "Long Beach") was permitted to intervene in the trial court and participated in the proceedings culminating in the summary judgment to which the present appeal is directed. (See Order Permitting Intervention of N. Joseph Ross filed January 29, 1964, Transcript 506)

It is the position of Intervenor Ross that the judgment herein appealed from should be affirmed.

Intervenor Ross does not believe it necessary or appropriate to respond to all of the assertions made by appellants, as these matters will no doubt be covered by the briefs to be filed by the various appellees.

We believe it may be helpful, however, to focus attention on a few aspects of the case which warrant particular emphasis.

ARGUMENT

I THE RIGHT TO PRO RATA DISTRIBUTION ANTE-DATED THE MERGER AGREEMENT AND COULD NOT BE DESTROYED BY THAT ARGUMENT.

The right to pro rata distribution among the shareholder members of Long Beach is founded, inter alia, on the Charter of Long Beach, the Settlement Agreement and the mutual nature of an Association such as Long Beach under Federal law.

A. The Charter

The Charter of Long Beach, and particularly Section 9 thereof, provides in part:

"...All holders of share accounts shall be entitled to equal distribution of net assets, pro rata to the value of their share accounts in the event of voluntary or involuntary liquidation, dissolution or winding up the association." (Emphasis added.)

We do not believe the Federal Home Loan Bank Board (hereinafter "Bank Board") has the power to abrogate that provision.

Nor would the existence of such power in the Bank Board be consistent with the rights of Intervenor and other shareholder members of Long Beach, including their constitutional rights of due process and equal protection and to be secure against the impairment of contractual obligations.

Treigle v. Acme Homestead Association,

297 U.S. 189 (1936),

Huntington v. National Savings Bank,

96 U.S. 388 (1878),

Hamilton National Bank v. District of

Columbia,

156 F. 2d 843, 846 (C.A. Dist. of

Col., 1946),

Intermountain Building & Loan Ass'n.

v. Gallegos,

78 F. 2d 972 (C.A. 9, 1935).

In Hamilton National Bank v. District of Columbia, supra, the court, in holding that a difference in treatment by the taxing authorities of National Banks and State Banks was an illegal discrimination, observes (156 F.2d 846):

"...The matter before us is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad

than is the power of the Congress in the first instance. While an interpretative administrative regulation consistent with the statute has great weight, one which 'operates to create a rule out of harmony with the statute, is a mere nullity.' We do not think that an administrative officer can restrict a statutory term such as 'incorporated savings bank' by a definition having no relation to savings deposits or accounts. He cannot eliminate by administrative definition, from the statutory provision some institutions identical in all respects related to savings deposits with institutions included in his definition. His attempt to do so is invalid as not in harmony with the statute."

Likewise, in the instant case the Bank Board may not eliminate, by administrative action, the

right of shareholders to participate pro rata in the distribution of the Equitable stock. The Board's attempt to do so is invalid as not in harmony with the Charter.

In an attempt to avoid the effect of the Charter provisions, appellants argue that:

1. Section 9 of the Charter does not apply to a "merger", and

2. The provisions of the Charter were superseded by the terms of the merger.

The former argument is predicated on what we believe to be a strained and unnatural reading of the Charter.

As for the suggestion that the merger agreement supersedes the Charter, we do not believe that the fundamental rights of the Long Beach members could thus be abrogated by mere fiat. It must be remembered that the right to pro rata distribution is not a mere ancillary

right but one which goes to the very heart of the Charter.

In relying upon the provisions of the Merger Agreement which were inserted at the instance of the Bank Board, appellants are in effect attempting to lift themselves by their own bootstraps. The fact is that the provisions of the Merger Agreement in question were and are a nullity and were properly stricken when challenged in the very proceedings contemplated by the Merger Agreement itself.

B. The Settlement Agreement

The right of pro rata distribution is reinforced by Article XV (h) of the Settlement Agreement, which provides as follows:

"XV(h) - After the assumption by Equitable of said aggregate principal amount of all Long Beach share accounts and after the payment or the making by Long Beach of provision for payment of all creditor and other liabilities, the net surplus, reserves and undivided profits of Long Beach shall be distributed as and when available to Long Beach shareholders of record at the close of business of the date (herein called 'Approval day') on which such plan shall be approved by the members of Long Beach as follows:

"(i) - Each such shareholder shall be entitled to such part of the amount of such distribution as the dollar value

in principal of his share account at the close of business on Approval Day bears to the total dollar value in principal of all Long Beach share accounts at the same time (not including said adjusting dividends in the computation). Each such shareholder shall be given written notice of his proportionate share as soon as practicable after Approval Day.

"(ii) - Such distribution shall be made from time to time, as directed by the Long Beach Directors subject to the next following sub-paragraphs (iii), (iv), (v), and (vi), until the total net surplus, reserves and undivided profits and any other remaining assets of Long Beach have been collected, converted into cash, and distributed according to such plan."

Appellants' belabored effort to avoid the effect of the Settlement Agreement reflects a

rather surprising position on the part of those who are claiming to act in the interests of "fairness".

C. Basic Federal Policy

The attempt of the Bank Board to prevent pro rata distribution not only flies in the face of the Charter and the Settlement Agreement, but also overlooks the basic policy embodied in the Federal statutes--a policy which appears to be overlooked by appellants.

Thus, 12 USC, Section 1464 (a) provides:

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (Emphasis added.)

The foregoing statutory provision points up the essential mutual nature of an Association such as Long Beach. In such a mutual Association preferences may not be given one depositor or shareholder over another.

Section 1464 also recognizes the sanctity of the Long Beach Charter which provides for pro rata distribution.

II APPELLANTS' NOTIONS OF "FAIRNESS" ARE
IRRELEVANT HERE.

Appellants' argument as to the alleged "fairness" of the forfeiture provisions in the merger agreement presupposes that the Bank Board would have authority to insert such provisions if it found them "fair". But while we do not concede that the forfeiture provisions are in any way fair or equitable, we submit that this question of "fairness" is beside the point here because appellants' arguments in that regard are based on a false premise.

Actually, there was no authority whatever in the Bank Board to require a forfeiture of the pro rata rights of the shareholder members of Long Beach regardless of the Board's notions of "fairness".

III THE SHAREHOLDER MEMBERS OF LONG BEACH
WERE NOT NOTIFIED OF ANY CONTEMPLATED
FORFEITURE AT THE TIME OF THEIR
DEPOSITS; THE ATTEMPTED FORFEITURE IS
THEREFORE VIOLATIVE OF DUE PROCESS.

There is one aspect of the case which
appellants appear to treat in a somewhat cavalier
fashion, namely, the fact that the shareholder
members of Long Beach were never notified at the
time they made their deposits that they might be
divested of their rights to a pro rata share in
the proceeds of the Association merely because
they pledged their stock or by reason of the size
of their accounts.

On the contrary, the mutual nature of the
Association, the provisions of the Charter and
the Settlement Agreement all constituted assur-
ance that each depositor would receive his pro
rata share.

We respectfully submit that neither the Bank Board nor any other party could subsequently insert provisions in the Merger Agreement or elsewhere which would preclude such depositors from receiving their pro rata share. Such action would plainly deprive them of the benefits of due process of law.

CONCLUSION:

The Summary Judgment from which the present appeal was taken is grounded on a thoroughly considered memorandum of the trial court and amply supported by considerations of precedent, logic and sound policy.

Therefore Intervenor Ross respectfully urges that the Judgment below be affirmed.

Respectfully submitted,

PACHT, ROSS, WARNE, BERNHARD
& SEARS

By *Harvey M. Grossman*
HARVEY M. GROSSMAN
Attorneys for Intervenor
N. Joseph Ross

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Harvey M. Grossman
HARVEY M. GROSSMAN

FEB 10 1967

No. 20380 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH,
LILLIAN G. FISHER, BARBARA McGALLIAND,
DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON,
heir of SUE M. WALTON, and DONALD WOOD,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Appellee.

APPELLANTS' BRIEF

*Interlocutory Appeal from Order Denying Motion to
Dissolve Restraining Order of the
United States District Court for the
District of Oregon*

HONORABLE WILLIAMS G. EAST, Judge

GREEN, RICHARDSON & GRISWOLD,
JAMES B. GRISWOLD,

1003 Corbett Building, Portland, Oregon,
Attorneys for Appellants.

NELS PETERSON,
NICK CHAIVOE,

1000 S. W. Third Avenue, Portland, Oregon,
Attorneys for Appellant Donald Wood.

WILLIAM, SKOPIL, AND MILLER,
OTTO SKOPIL,

Fourth Floor—Pioneer Trust Building, Salem, Oregon,
Attorneys for Appellee.

INDEX

	Page
Statement of Jurisdiction	1
Statement of the Case	4
A. Summary of Facts	4
B. Question Presented	5
Specification of Errors	6
Summary of Argument	6
Argument	7
The district court committed an error of law when it concluded that it was not required to suspend the exercise of its jurisdiction pending administrative determination of appellees' alleged claims ..	7
A. Interpleader is an in personam proceeding and is an equitable remedy and is controlled by equitable principles	7
B. Personal service on all prospective claimants under 28 U.S.C.A. 2361 is a prerequisite to jurisdiction in a proceeding under 28 U.S.C.A. 1335	8
1. In this case appellee is seeking injunctive relief through a restraining order and, since an injunction is being sought, personal service of all defendants must be obtained	8
2. Where there are two statutes concerning the same subject, one general and one specific, the specific statute controls	10
Conclusion	14
Certificate	14

TABLE OF CASES AND AUTHORITIES

	Page
CASES	
Aetna Life Insurance Company v. DuRoure, 123 F. Supp. 736	7, 8
Anderson v. Gladden, 188 F. Supp. 666 (Or.) Affd. 293 F.2d 463 (Ninth C.C.A.)	11
Bulova Watch Co. v. United States, 6 L. Ed. 2d 72, 76	11
C.I.R. v. Riviera's Estate, 214 F.2d 60	11
Clement Martin v. Dick Corporation, 27 F. Supp. 961	7, 9
Jett Drilling Co. v. Tibbetts, 230 F. Supp. 58	7
Magnaflux Corporation v. Foerster, 223 F. Supp. 552 (D.C. Ill. 1963)	13
Metropolitan Life Insurance Company v. Dumson, 194 F. Supp. 9	9
McEvoy v. United States, 88 L. Ed. 1163, 1167	11
New York Life Insurance Co. v. Dunlevy, 241 U.S. 518, 521, 36, S. Ct. 613, 60 L. Ed. 1140	9
Pan American Fire and Casualty Co. v. Revere, 188 F. Supp. 474	7
Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565	9
Republic of China v. American Express, 108 F. Supp. 169, 170	9
Stewart v. United States, 116 F.2d 405	11
United States v. Hawkins, 228 F.2d 517	11
United States v. Montreal Trust Company, 35 F.R.D. 216 (1964)	12

TABLE OF CASES AND AUTHORITIES (Cont.)

Page

FEDERAL STATUTES

28 U.S.C.A. 1292 (a) (1)	3
28 U.S.C.A. 1335	8
28 U.S.C.A. 2361	10, 12

RULES

Rule 73 (a), Federal Rules of Civil Procedure	3
Rule 4 (e), Federal Rules of Civil Procedure ..	11, 12, 13
Rule 4 (i), Federal Rules of Civil Procedure ..	11, 12, 13
Rules 1-11, Federal Rules of Civil Procedure ..	12

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, et al,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
Appellee.

APPELLANTS' BRIEF

*Interlocutory Appeal from Order Denying Motion
to Dissolve Restraining Order of the
United States District Court
for the District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

STATEMENT OF JURISDICTION

This action in the nature of interpleader was filed by Appellee on January 22, 1965, in the United States District Court, for the District of Oregon January 22, 1965, Appellee filed its Motion for an Order to Show Cause why a temporary restraining order enjoining all named defendants from instituting or prosecuting any proceeding in any federal or state court against the plaintiff and defendant Ellis D. Clark, should not be entered.

On January 22, 1965, the Court entered its Order directing and requiring each of the defendants to appear and show cause in writing why such temporary restraining order should not be granted. On or about the 11th day of February, 1965, defendant Theron Nauta filed Motion to Dismiss plaintiff's complaint. On February 12, 1965, defendant Greyhound Lines, Inc., filed its Motion and Objections to Issuance of Temporary Restraining Order and the marshal's return of service on Canadian defendants was filed. On the 23rd day of February, 1965, the defendant Mary Chishefski and defendant Edward Hollenbeck filed their motions and objections to the issuance of the temporary restraining order. On the 25th day of March, 1965, defendant Greyhound Lines, Inc. filed a Motion for an Order to Show Cause why plaintiff and co-defendants should not be enjoined from instituting or further prosecuting any action against it or its employee, Theron Nauta, and pursuant to said Motion, such order to show cause was entered on the 25th day of March, 1965. On the 26th day of April, 1965, motions of defendants Mary Chishefski and Edward Hollenbeck to set aside the order to show cause and to dismiss the complaint of State Farm Fire and Casualty Company were denied. On the 25th day of March, 1965, defendant Greyhound Lines, Inc. filed its Answer and Cross-Claim for Declaratory Relief and Demand for Trial by Jury. On the 3rd day of May, 1965, a temporary restraining order enjoining all defendants except defendant Gladys Hart from instituting or prosecuting any proceedings in any state or federal court against the plaintiff or any defendant who might con-

stitute a plaintiff's assured was entered. Thereafter, on the 17th day of May, 1965, Motion to Dismiss or in the alternative for Change of Venue and to dissolve the restraining order was filed by defendants Kathryn Tashire, Eva Smith, Harry Smith, Lillian G. Fisher, Barbara McGalliand, Doris Rogers, Gail R. Gregg, and Richard L. Walton, heir of Sue M. Walton. On the 21st day of May, 1965, a Motion in Limine to Quash and Dismiss and for an Order Dissolving any Temporary Restraining Order or in the Alternative for Change of Venue was filed by defendant Donald Wood. June 1, 1965, the District Court entered its Order denying appellant's motion for an order dissolving the restraining order, denying the motions to dismiss, extending the time within which to hear the motion for change of venue and holding that the service upon defendant Donald Wood by substituted service was defective but granting plaintiff time in which to perfect service upon defendant Donald Wood. Appellants Kathryn Tashire, Eva Smith, Harry Smith, Lillian G. Fisher, Barbara McGalliand, Doris Rogers, Gail R. Gregg, and Richard L. Walton, heir of Sue M. Walton, on the 30th day of June, 1965, filed a Notice of Appeal pursuant to provisions of 28 USCA § 1292, (a)(1). On June 30, 1965, appellant Donald Wood filed his Notice of Appeal pursuant to 28 USCA § 1292 (a)(1), all within the time allowed by Rule 73(a), Federal Rules of Civil Procedure. Consequently, this Court has jurisdiction to review said Order Denying Motion to Dissolve Restraining Order under the provisions of 28 USCA § 1292 (a)(1).

STATEMENT OF THE CASE

A. Summary of Facts

Appellee has filed an action in the nature of interpleader, naming as defendants numerous paying passengers on a Greyhound Lines, Inc. bus involved in an accident which happened in the State of California. Appellee is the insurance carrier for the driver of the vehicle which was involved in the collision with the said Greyhound Lines bus. The vehicle driven by appellee's insured was owned by another person, who had no insurance. All of the passengers on the bus incurred personal injuries in some degree. These passengers, according to paragraphs IV, V, VI, VII and VIII of appellees' complaint are residents of various of the states of the United States and the provinces of Canada. Among other things, appellee requests an injunction be entered restraining defendants from prosecuting pending suits against the plaintiff or plaintiff's insured or from instituting like proceedings in any federal or state court. All of the defendants residing in the United States were personally served with the exception of appellant, Donald Wood. No personal service was had upon the defendants who are residents in Canada. Substituted service was had upon appellant Donald Wood by serving his wife, Linda Wood, in Berkeley, California. However, the return of service by the United States Marshal did not show that appellant Wood was not in the state of California and could not be served there. On May 3, 1965, plaintiff caused a temporary restraining order to be entered by this Court, whereby all appellants were restrained and enjoined from instituting or prosecuting any proceeding

against the plaintiff or its assured in any federal or state court.

Appellants Tashire, Eva Smith, Harry Smith, Fisher, McGalliand, Rogers, Gregg and Walton moved to dismiss plaintiff's action in the nature of interpleader and for an Order Dissolving the Temporary Restraining Order on jurisdictional grounds. The basis of said motion was that the defendants residing in Canada could not be properly served; that the said Canadian residents were claimants to the fund, attempted to be brought into court by the appellee, and were indispensable parties and that before interpleader would lie, all indispensable parties were required to be within the jurisdiction of the Court. Appellant Wood also filed a motion in limine to quash service and dismiss and to dissolve the restraining order on the same grounds and for the further reason that he had not been properly served and was not properly before the Court, and therefore, the interpleader must fail for lack of jurisdiction.

It should be noted that the District Court gave appellee additional time in which to properly serve defendant Wood; that as of September 21, 1965, a return was made by the United States Marshal and filed October 5, 1965, showing that defendant Wood was not served; that there is no showing that he is not within the State of California, and not available for service.

B. Question Presented:

The foregoing facts, the points and authorities filed in support of and in opposition to appellants' motion and the argument before the Court present the follow-

ing question. Does the United States District Court for the District of Oregon have jurisdiction of the person of residents of Canada who have been served by registered mail, so as to render the restraining order effective and is therefore not required to dissolve its order enjoining defendants-appellants from instituting or prosecuting proceedings against appellee or its assured and Greyhound Lines, Inc. and its employee, Theron Nauta?

SPECIFICATION OF ERRORS

The Court Committed error when it concluded:

1. That interpleader is a proceeding in rem and not in personam.
2. That service by registered mail, pursuant to Rule 4(1) of the Federal Rules of Civil Procedure, was valid service in this case.
3. That there is proper jurisdiction over all defendants and therefore denied appellants' motion to dissolve the restraining order enjoining defendants-appellants from prosecuting a cause of action against plaintiff's assured, and Greyhound Lines, Inc. and its employee.

SUMMARY OF ARGUMENT

The District Court committed an error of law when it concluded that there was proper jurisdiction over this cause and appellants herein and when it concluded that the motion to dissolve the restraining order of May 3, 1965, and the motion to dismiss were not well taken.

A. An action in the nature of interpleader is a proceeding in personam.

B. Personal service on all prospective claimants under 28 USCA 2361, is a prerequisite to jurisdiction in a proceeding under 28 USCA, 1335.

1. All possible adverse claimants to a fund require proper service before the Court has jurisdiction to adjudicate an action in the nature of interpleader.

2. Where there are two statutes concerning the same subject, one general and one specific, the specific statute controls.

ARGUMENT

The District Court committed an error of law when it concluded that it had jurisdiction of the action in nature of interpleader and that the motion of the appellants for an order dissolving the restraining order of May 3, 1965, and to dismiss were not well taken.

A. Interpleader is an in personam proceeding and is an equitable remedy and is controlled by equitable principles. *Jett Drilling Co. v. Tibbetts*, 230 F. Supp. 58, (1964); *Pan American Fire and Casualty Co. v. Revere*, 188 F. Supp. 474, (1950); *Aetna Life Insurance Co. v. Du Roure*, 123 F. Supp. 736; *Clement Martin v. Dick Corporation*, 27 F. Supp. 961.

The District Court during argument impliedly held (T 15-18, 20-23, T 25, 20-23, 24-25, T 26, 1-12) because a res was surrendered to the Court, the proceeding was necessarily in rem, and the injunctive proceedings were

merely for the protection of the res. The mere fact that a person against whom an in personam liability is asserted deposited money into Court, does not thereby transform that liability into a res and thereby enable the Court to proceed to adjudication by in rem or quasi in rem process of the defendants' in personam claims. *Aetna Life Insurance Company v. Du Roure*, 123 F. Supp. 136.

Appellee argued that the alleged deposit of a fund created a res and that this cause was therefore an action in rem and accordingly any form of notice to the claimants to the said fund to come in and make their claims was sufficient. Furthermore, since this then was an in rem proceeding, and defendants living in foreign countries would have to come to the United States to make their claims, they could therefore, be forced to come in and make their claims or be forever foreclosed. Under the foregoing theory the position of appellee can be upheld only if the within cause is a proceeding in rem. Since interpleader is an in personam proceeding and not in rem, appellees position is not tenable.

B. Personal service on all prospective claimants under 28 USCA 2361 is a prerequisite to jurisdiction, in a proceeding under 28 USCA 1335.

All possible adverse claimants to a fund require proper service before the court has jurisdiction to adjudicate an action in the nature of interpleader.

1. In this case, appellee is seeking injunctive relief through a restraining order, and, since an injunction is being sought, personal service of all defendants must be

obtained. *Clement & Martin v. Dick Corporation*, 97 F. Supp 961; *Republic of China v. American Express*, 108 F. Supp, 169, 170.

In the latter case in the District Court for the Southern District of New York, it was held that before a trial could be had, in connection with interpleader proceedings, it was necessary that all possible adverse claimants required personal service before the Court would have jurisdiction of the cause. Unless service can be made upon all defendants in this cause, this Court is without jurisdiction as to those not served and cannot render any judgment with respect to the funds deposited with the Court by the appellee which would be binding upon those not properly served. Since those not served are indispensable parties, no final adjudication as to the rights of all the claimants can be had. The appellants who are residents of Canada are indispensable parties. *Metropolitan Life Insurance Company v. Dumson*, 194 F. Supp. 9 (1961); S. D. New York. In that case, the Court stated at page 11:

“(1, 2) Interpleader is an action in personam which brings about a ‘final and conclusive adjudication of * * * personal rights’ and required that a claimant to the fund be brought before the court in order for a judgment to be binding upon him. *New York Life Insurance Co. v. Dunlevy*, 241 US 518, 521, 36 S. Ct. 613, 60 L. Ed. 1140. See also *Pennoyer v. Neff*, 95 US 714, 24 L. Ed. 565. Since plaintiff has failed to perfect service on Baruch Lewittes, this Court is without jurisdiction as to him and cannot render any judgment in respect to the fund deposited with the Court which would be binding

upon him. Baruch Lewittes is an indispensable party to this action as conflicting claims to the fund on deposit cannot be resolved without him. The failure of plaintiff to bring him before the Court requires dismissal of the Complaint. Rule 12 (b)(7), FRCP; see also Rule 19, 3 Moores Federal Practice, p. 2101 et seq. (2 Ed, 1948).

2. Where there are two statutes concerning the same subject, one general and one specific, the specific statute controls.

28 USCA 2361 provides:

“In any civil action of interpleader or in the nature of interpleader, under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any state or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States Marshals for the respective districts where the claimants reside or may be found.”

In the case at bar, reliance is based upon the interpleader sections to support jurisdiction in this Court. The statute cited above provides that all process shall be served by the United States Marshal in the districts where claimants reside or may be found. Under this statute, there is no method by which appellee may validly serve defendants not residents of the United States.

This is a specific statute providing for service of process in an action of interpleader.

Appellee in argument contends that Rule 4(i) of the FRCP as amended, effective July 1, 1963, authorizes service by mail upon defendants residing outside of the continental United States. It is axiomatic that where a specific statute controls the same subject matter covered in a general statute, the specific statute controls without regard to priority of enactment. *Bulova Watch Co. v. United States*, 6 L. Ed.2d 72, 76; *McEvoy v. United States*, 88 L. Ed. 1163, 1167.

The general statute does not repeal the specific statute unless such repeal is expressly set forth. Repeal is never implied. *C. I. R. v. Riviera's Estate*, 214 F.2d 60; *United States v. Hawkins*, 228 F.2d 517; *Stewart v. United States*, 116 F.2d 405.

Congress is presumed to know the contents of its statutes and if it intends the general statute to amend the specific statute it would so state.

Anderson v. Gladden, 188 F. Supp. 666 (Or.) Affmd. 293 F.2d 463, (Ninth Circuit) cert. denied.

Sub Section (e) of Rule 4 FRCP states as follows:

"Whenever a statute of the United States or an order of Court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the District Court is held, service may be made under the circumstances and in the manner prescribed by the statute or court, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule, * * *."

28 USCA 2361 provides for a method of service as set forth above in Rule 4 (e) and is therefore controlling.

It is further submitted that subsection (i) Rule 4, FRCP is not applicable here. Appellee has contended in argument that 4 (i) created additional methods of service. This is erroneous. It seems clear that the intent of the amendments which were effective July 1, 1963, was to extend methods of service in Federal Court so as to be harmonious with those provided in state proceedings. No new methods for service of process were created. See notes of Advisory Committee on Rules, page 27, 1964 Cumulative Annual Pocket Parts 28 USCA Rules 1-11. The language referred to is as follows:

“Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of the Court of a state, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient.

The case of *United States v. Montreal Trust Company*, 35 FRD 216 (1964) supports this position. The language, as it appears at page 219, is as follows:

“It is clear, therefore, that by virtue of a federal rule having the force of federal statute, service of a summons in an action in the federal court in New York may be made, whenever a New York statute so provides, upon a defendant who is not an inhabitant of New York or found within that state. Does the rule mean that although the service may be

made outside New York, it must nevertheless be made within the United States? The rule does not say so.

“And Rule 4(i) is a clear indication that Rule 4(e) is not so restricted. Rule 4(i) relates to the manner of service to be followed in making service in a foreign country. It begins ‘(w)hen the federal or state law referred to in subdivision (e) of this rule (i.e., Rule 4(e)), authorizes service upon a party not an inhabitant of or found within the state in which the District Court is held, and service is to be effected upon the party in a foreign country,’ service may be made in the fashion prescribed by the rule. This recognizes that Rule 4(e) contemplates that service pursuant to state law may be made in a foreign country. Service under the Illinois “long-arm” statute, which is similar to New York’s (Ill. Rev. Stat. Ch. 110, §§ 16, 17), effected upon a defendant in Germany, has been upheld in an action in the Federal District Court for the Northern District of Illinois. *Magnaflux Corporation v. Foerster*, 223 F. Supp. 552 (D. C. ND. Ill. 1963).”

Foreign service was authorized in this decision inasmuch as the state statute provided for such service, and the cause arose in that state.

CONCLUSION

For the reasons set forth hereinabove the order denying appellants' motion to dissolve the restraining order should be reversed and the cause remanded with directions to grant appellants' motion to dissolve the restraining order and to dismiss for lack of jurisdiction.

Respectfully submitted,

GREEN, RICHARDSON & GRISWOLD,
JAMES B. GRISWOLD,
Attorneys for Appellants.

NELS PETERSON,
NICK CHAIVOE,
Attorneys for Appellant
Donald Wood.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES B. GRISWOLD,
Of attorneys for Appellants

FEB 10 1967

No. 20380

In the
United States Court of Appeals
For the Ninth Circuit

KATHERINE TASHIRE, EVA SMITH, HARRY SMITH,
LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS
ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir
of SUE WALTON, and DONALD WOOD,
Appellants,

vs.

STATE FARM FIRE AND CASUALTY COMPANY and
GREYHOUND LINES, INC.,
Appellees.

BRIEF FOR APPELLEE
GREYHOUND LINES, INC.

Interlocutory Appeal from Order Denying Motion
to Dissolve Restraining Order
of the

United States District Court for the
District of Oregon

HONORABLE WILLIAM G. EAST, Judge

McCOLLOCH, DEZENDORF & SPEARS
JOHN GORDON GEARIN
JAMES H. CLARKE

8th Floor, Pacific Building
Portland, Oregon 97204

Attorneys for Appellee Greyhound Lines, Inc.

FILED

DEC 8 1965

THOMAS H. SCHMID, Clerk



SUBJECT INDEX

	PAGE
Jurisdiction	1
Supplemental Statement of the Case	4
Argument	5
Introduction	5
1. The critical need for interpleader relief and the restraining order.	6
2. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 2361	9
3. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 1655	10
4. Jurisdiction over the Canadian claimants was obtained under and in the manner set forth in Rule 4 FRCP.	14
5. The action should not be dismissed.	17
Conclusion	18
Certificate	19

TABLE OF CASES

	PAGE
A/S Krediid Pank v. Chase Manhattan Bank, (DC SD NY 1957) 155 F Supp 30, aff'd (CA 2 1962) 303 F2d 648	12, 13
Aetna Life Ins. Co. v. DuRoure, (DC SD NY 1954) 123 F Supp 736	10, 13
Agricultural Ins. Co. v. The Lido of Worcester, (DC Mass 1945) 63 F Supp 799	10
All Continent Corporation v. Steelman, (CCA 3 1936) 86 F2d 913, rev'd on other gds (1937) 301 US 278	12
Atkinson v. Superior Court, (1957) 49 Cal 2d 338, 316 P2d 960, app dism'd (1958) 357 US 569	14
Builders and Developers Corp. v. Manassas Iron & Steel Co., (DC Md 1962) 208 F Supp 485	6
Commercial Union Insurance Co. of New York v. Adams, (DC SD Ind 1964) 231 F Supp 860	7, 8
Cordner v. Metropolitan Life Insurance Company, (DC SD NY 1964) 234 F Supp 765	10
Davis v. Gahan, (DC SD NY 1964) 227 F Supp 867	17
Hallin v. M. A. Pearson, Inc., (DC ND Cal SD 1963) 34 FRD 499	5
Hoffman Motors Corporation v. Alfa Romeo, (DC SD NY 1965) 244 F Supp 70	15
Kuerschner & Rauchwarenfabrik v. New York Trust Co., (DC SD NY 1954) 126 F Supp 684	10
New York L. Ins. Co. v. Dunlevy, (1916) 241 US 518, 36 S Ct 613, 60 L Ed 1140	13, 14
New York Life Insurance Company v. Welch, (CA DC 1961) 297 F2d 787	6
Pan American Fire & Casualty Company v. Revere, (DC ED La 1960) 188 F Supp 474	8, 9, 12
Republic of China v. American Exp. Co., (DC SD NY 1951) 95 F Supp 740, aff'd (CA 2 1952) 195 F2d 230, opinion on remand (DC SD NY 1952) 108 F Supp 169	12, 13
San Rafael Compania Naviera, S.A. v. American Smelt. & R. Co., (CA 9 1964) 327 F2d 581	12

TABLE OF CASES—(Contd.)

	PAGE
United States v. Cardillo, (DC WD Pa 1955) 135 F Supp 798	10
United States v. Montreal Trust Company, (DC SD NY 1964)	
35 FRD 216	16

OTHER AUTHORITIES

Rule 4 FRCP	5, 15, 16, 17
Advisory Committee comments on Rule 4 FRCP, 28 USCA, pocket part 27	12, 17
Rule 22 FRCP	6, 8, 9, 10, 11, 12
Judicial Revision Code (1948)	10
28 USC § 1292	4
28 USC § 1332	2
28 USC § 1335	2, 6, 8, 9, 10, 11, 12
28 USC § 1655	10, 11, 12, 13, 15, 16
28 USC § 2361	5, 8, 9, 15, 16
ORS 15.110	17
ORS 15.130	17
California Code of Civil Procedure § 417	14
2 Moore's Federal Practice (2d Ed) 1249 (Par 4.34)	17
3 Moore's Federal Practice (2d Ed) 3046 (Par 22.13)	12
3 Moore's Federal Practice (2d Ed) 3007 (Par 22.04)	6
Anno: 17 ALR 2d 741 (1951)	5
30 ALR 2d 208 (1953)	13
53 ALR 2d 1164 (1957)	12
70 ALR 2d 416 (1960)	7

No. 20380

In the

**United States Court of Appeals
For the Ninth Circuit**

KATHERINE TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN
G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL
R. GREGG, RICHARD L. WALTON, heir of SUE WALTON, and
DONALD WOOD,

Appellants,
vs.

STATE FARM FIRE AND CASUALTY COMPANY and GREY-
HOUND LINES, INC.,

Appellees.

Interlocutory Appeal from Order Denying Motion
to Dissolve Restraining Order
of the
United States District Court for the
District of Oregon

HONORABLE WILLIAM G. EAST, Judge

**BRIEF FOR APPELLEE
GREYHOUND LINES, INC.**

JURISDICTION

This is an action in the nature of interpleader filed on January 22, 1965 by appellee State Farm Life and Casualty Company, an Illinois corporation, seeking (1) a determination of its liability to defend and to extend coverage to the driver of a pickup truck which collided with a Greyhound bus near Redding, California on

September 19, 1964; and (2) an adjudication of defendants' claims against the policy limits of \$20,000, which sum was paid into court. Named as defendants were the driver and the owner of the pickup truck, the bus company and its driver, and the 35 bus passengers (and their representatives) who are citizens and residents of Oregon, California, Washington, South Dakota, Montana and Canada. There is diversity of citizenship between plaintiff and all defendants and among the defendants themselves (R 1-3). Jurisdiction was based on 28 USC § 1335 (the interpleader statute) and § 1332 (diversity of citizenship) (R 3).

The complaint alleged that

1. Plaintiff believed there was neither coverage nor any duty to defend, because the pickup truck was being used in the business of its owner, not the insured driver, at the time of the accident;
2. At least four actions totaling \$1,110,000 had been filed against the driver in California and others were threatened;
3. Plaintiff was not authorized to admit the driver's liability for the accident;
4. The amount of liability for injuries and deaths in the accident, if established, would exceed the policy limits; and

5. If the court should determine that there was coverage, plaintiff would relinquish its claim to the fund to the extent needed to satisfy defendants' claims (R 1-6).

An order was entered on January 22 requiring defendants to show cause why they should not be restrained from instituting or prosecuting suits in state or federal courts affecting the property or obligation involved in the action, and specifically against plaintiff and its insured (R 13-14). This order was served, together with the summons and complaint, personally in Oregon or by substituted personal service on all of the American defendants except Gladys Hart (R 15-68).¹ The Canadian defendants were served by registered mail (R 69-80).

On May 3, 1965² the trial judge, having previously overruled motions and objections of defendants Nauta (the bus driver), Greyhound Lines, Inc., Chisefski and Hollenbeck (none of whom are appellants herein), entered an order restraining defendants (except Gladys Hart) from instituting or prosecuting proceedings in any state or federal court affecting the property or obligation involved in the action and specifically pro-

1. Service on Gladys Hart (R 190A) and Donald Wood was thereafter perfected.

2. The order of May 3, 1965 was "modified" on July 19, 1965 to permit defendants to file (but not to prosecute) suits. It was entered in response to the motion of appellants Fisher, Rogers, Gregg and Walton filed July 15, 1965, after they had commenced this appeal (R 218).

ceedings against plaintiff or defendants who might constitute its assureds. None of the other defendants opposed entry of the order (R 148, 150).

On May 17 and 21, 1965 the nine defendants who are appellants herein moved for an order dissolving the restraining order and dismissing the action for lack of jurisdiction over the parties (R 178, 182). Those defendants are citizens and residents of Washington (2), Oregon (1), California (1) and Canada (5). The motions were denied on June 1, 1965 (R 195). Interlocutory appeals were taken from that order on June 30, 1965 (R 204, 210). This Court has jurisdiction under 28 USC § 1292.

SUPPLEMENTAL STATEMENT OF THE CASE

The Position of Appellee Greyhound Lines, Inc.

Greyhound is a named defendant in the action and was served with summons and complaint and the order to show cause at Portland, Oregon on January 26, 1965 (R 23). On February 12, 1965 Greyhound moved unsuccessfully for orders dissolving the order to show cause and dismissing the action for lack of jurisdiction (R 90). It did not thereafter oppose the action, nor did it join in the appeal.

Many actions have been commenced against Greyhound in California, Oregon³ and Washington for in-

³. By way of cross claims in this case (R 130).

juries and deaths arising out of the accident, and more are threatened (R 130-131). It became apparent to Greyhound that this interpleader action, if it can be maintained, provides a convenient and proper proceeding in which to resolve many or all claims arising out of the accident, including claims against Greyhound.

Hallin v. C. A. Pearson, Inc., (DC ND Cal SD 1963)
34 FRD 499 at 501-502

Anno: 17 ALR 2d 741 (1951)

On March 25, 1965 Greyhound filed an answer and cross claim against its co-defendants seeking a determination that it was not responsible for the accident (R 127).

ARGUMENT

Introduction

The American appellants were served with process and the restraining order under 28 USC § 2361, and appellants do not attack the propriety of the order as to them. Their only contention is that it should be reversed and the action dismissed, because the Canadian claimants were not served within the United States.⁴

4. Appellants do not attack the sufficiency of proof of service on the Canadian claimants, which would not affect its validity in any case. Rule 4(g) FRCP.

1. The critical need for interpleader relief and the restraining order.

The interpleader statute⁵ is remedial and is to be liberally construed to prevent multiple litigation and the risk of multiple liability.

New York Life Insurance Company v. Welch, (CA DC 1961) 297 F2d 787 at 790

Builders and Developers Corp. v. Manassas Iron & Steel Co., (DC Md 1962) 208 F Supp 485 at 489

Similarly, Rule 22(1) FRCP⁶ provides "the most modern and liberal method of obtaining interpleader to be found" (3 Moore's Federal Practice (2d Ed) 3007 (Par 22.04(1))).

The need for relief in cases involving multiple claims against a limited fund arising out of a single disaster has given substance to these rules. The many bus passen-

5. 28 USC § 1335 provides:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of \$500 or more, * * * if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, * * *."

6. Rule 22(1) FRCP provides:

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. * * *"

gers and Greyhound are, as to the basic questions of coverage and liability, in identical positions. Although their separate claims will vary in amount according to their respective injuries and losses, multiple litigation over these common questions may well produce conflicting decisions which will benefit some and wholly deny relief to others. Furthermore, the insurance policy, assuming both liability and coverage, is obviously insufficient to satisfy all of the claims, and interpleader has the obvious advantages of marshaling its limits and protecting the insurer both from multiple litigation and from the risk of multiple liability. Interpleader relief is proper in such cases, even if the plaintiff is not a wholly disinterested stakeholder, because the alternative to it is the simultaneous prosecution of many widely scattered lawsuits separately contesting the same issues and a race to judgment in which many claimants will be denied any recovery at all. See 70 ALR 2d 416 (1960).

Commercial Union Insurance Co. of New York v. Adams, (DC SD Ind 1964) 231 F Supp 860 at 863, 867:

“Finally, it has been urged that the action is not proper because the claimants do not have claims adverse to each other. It might, by the same reasoning, be said that 100 persons adrift in the ocean with but one small lifeboat in sight were not adverse to each other. We fear, however, that the concept of non-adversity would dwindle in direct proportion to the number of swimmers reaching the boat. * * *

* * * * *

Two of the prime purposes of the interpleader statute are to avoid multiplicity of actions, and to avoid an inequitable division of a common fund when the fund is insufficient to pay all of the claims against it. Both prospective situations have arisen out of the Coliseum disaster, and both may be minimized in this interpleader proceeding."

Restraining orders are essential to the effectiveness of interpleader relief in major disaster cases, and they are expressly authorized in § 1335 cases under 28 USC § 2361.

Commercial Union Insurance Co. of New York v. Adams, supra, (DC SD Ind 1964) 231 F Supp 860 at 867-868

They are also proper in interpleader cases under Rule 22(1).

Pan American Fire & Casualty Company v. Revere, (DC ED La 1960) 188 F Supp 474 at 485:

"* * * every indication is that, regardless of the Interpleader Act, the power of a federal court to enjoin pending state court proceedings in a case like this one will be sustained. Certainly that result is desirable, if not indispensable. If the court had no power to enjoin concurrent state court proceedings,

the grant of interpleader would often create more problems than it solved.”⁷

2. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 2361.

Section 2361 provides:

“In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.”

Appellants contend that foreign service⁸ is prohibited by § 2361, although the statute does not so state and the courts have said remarkably little about it.

7. *Revere* was an interpleader action by the insurer of a truck which had collided with a school bus. After an exhaustive review of the cases, Judge Wright sustained jurisdiction under § 1335 and issued an injunction. He also held that restraining orders could issue against state court proceedings in a Rule 22(1) case.

8. By “foreign service,” we mean service outside the United States.

See *Kuerschner & Rauchwarenfabrik v. New York Trust Co.*, (DC SD NY 1954) 126 F Supp 684 at 689 (dictum; proceeding under Rule 22(1) FRCP)

Cordner v. Metropolitan Life Insurance Company, (DC SD NY 1964) 234 F Supp 765 at 767 (same)

Aetna Life Ins. Co. v. DuRoure, (DC SD NY 1954) 123 F Supp 736 at 739-740

Agricultural Ins. Co. v. The Lido of Worcester, (DC Mass 1945) 63 F Supp 799 at 801 ("Process may run at least throughout all the states.")

The basis for implying such a limitation seems particularly slender in view of the Judicial Revision Code of 1948, which extended interpleader jurisdiction under § 1335 to controversies involving alien claimants. In *United States v. Cardillo*, (DC WD Pa 1955) 135 F Supp 798, registered mail notice of denaturalization proceedings was sustained in the face of a statute requiring notice by personal service or publication, the Court holding that the statute should be "liberally construed" to require only actual notice to persons outside the United States (which the Canadian appellants already have) and an opportunity to defend (which they also have). The statute should be construed to permit foreign service upon claimants who are outside the United States.

3. Jurisdiction to proceed with the action and issue the restraining order under 28 USC § 1655.

28 USC § 1655 provides:

“In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.”

It is asserted that personal jurisdiction is a prerequisite to relief in interpleader cases under Rule 22(1) or § 1335 which seek to adjudicate personal rights. If, however, appellees correctly contend that this is a proceeding *quasi in rem* with respect to the fund deposited in court, it is not necessary that personal jurisdiction be secured over all claimants as a condition to exercising jurisdiction over the fund and protecting it by a restraining order.

a. Section 1655 impliedly authorizes foreign service in interpleader actions involving a *res* brought under Rule 22(1) FRCP based on diversity jurisdiction (pres-

ent in this case)⁹ and should equally permit such service in proceedings under § 1335.

Republic of China v. American Exp. Co., (DC SD NY 1951) 95 F Supp 740 at 743-744, aff'd (CA 2 1952) 195 F2d 230, opinion on remand (DC SD NY 1952) 108 F Supp 169

A/S Kreditt Bank v. Chase Manhattan Bank, (DC SD NY 1957) 155 F Supp 30, aff'd (CA 2 1962) 303 F2d 648

See also *San Rafael Compania Naviera, S.A. v. American Smelt. & R. Co.*, (CA 9 1964) 327 F2d 581 at 587-588 (proceeding under Interpleader Act)

Although the geographical scope of the District Court's injunctive power in a Rule 22(1) interpleader suit not involving a fund may be limited to the district in which it sits (3 Moore's Federal Practice (2d Ed) 3046 (Par 22.13)), where jurisdiction exists under § 1655 the court may enjoin parties from taking action elsewhere affecting the fund.

All Continent Corporation v. Steelman, (CCA 3 1936) 86 F2d 913 at 915, rev'd on other grounds (1937) 301 US 278

See also *Pan American Fire & Casualty Company v. Revere*, supra, (DC ED La 1960) 188 F Supp 474 at 483-485

9. See the comments of the Advisory Committee on the Federal Rules concerning the 1963 amendments to Rule 4 (28 USCA pocket part at p 27); Anno: 53 ALR 2d 1164 at 1203-1204 (1957) (foreign service under nonresident motorist statutes).

b. Appellants assert (Br 7-8) that interpleader suits are necessarily actions *in personam* to which § 1655 has no application. On the contrary, the nature of the proceeding depends on the issues. Their contention is based on *New York L. Ins. Co. v. Dunlevy*, (1916) 241 US 518, 36 S Ct 613, 60 L Ed 1140, in which the Supreme Court held that a state court could not determine the right of a nonappearing nonresident claimant to the proceeds of an annuity insurance policy, even though the insurer had deposited the policy proceeds in court and sought to interplead both claimants. See also *Aetna Life Ins. Co. v. DuRoure*, *supra*, (DC SD NY 1954) 123 F Supp 736 at 739-740.

However, since *Dunlevy* it has repeatedly been held that an indebtedness in the form of a fund is a sufficient *res* to support jurisdiction under § 1655 and that conflicting claims to it—including claims of absent foreigners—can be determined in interpleader proceedings.

Republic of China v. American Exp. Co., *supra*, (DC SD NY 1951) 95 F Supp 740 at 743-744 (claims to bank account)

A/S Krediit Pank v. Chase Manhattan Bank, *supra*, (DC SD NY 1957) 155 F Supp 30

Anno: 30 ALR 2d 208 at 251 et seq (1953)

In even broader terms, a simple contract claim (without any fund) was held to be within a state court's *quasi in rem* jurisdiction in *Atkinson v. Superior Court*, (1957) 49 Cal 2d 338, 316 P2d 960, app dism'd (1958) 357 US 569, which rejected jurisdictional objections based on *Dunlevy*. *Atkinson* was an action by local employees against their local employers and a nonresident trustee for a determination that a collective bargaining agreement was invalid and that sums payable under it to the trustee were actually wages owing to the local claimants. California law forbids judgments on "personal" claims against nonappearing nonresidents (§ 417 CCP). Justice Traynor stated the question as being

" * * * whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions."

After a thorough review of the cases, the court sustained the trial court's *quasi in rem* jurisdiction.

4. Jurisdiction over the Canadian claimants was obtained under and in the manner set forth in Rule 4 FRCP, which provides an additional manner of service upon nonresident claimants and extends such service to all cases in which nonresident service is authorized by state or federal law.

As amended, Rule 4(e) provides:

"Same: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. * * *"

As amended, Rule 4(i) provides:

"Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: * * * (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; * * *"

These amendments provide, in the case of foreign service, an alternative mode of service to that provided in § 2361 and § 1655. *Hoffman Motors Corporation v. Alfa Romeo*, (DC SD NY 1965) 244 F Supp 70 at 77-81.

It is by force of the rule itself that this additional mode of service is effective. But the rule does more than that. It expands the cases in which foreign service is proper to any case in which state or federal law permits service outside the district. Constitutional objections to such reference to state law have been rejected.

“The amended Rules 4(e) and 4(f) do not contravene the Enabling Act (28 U.S.C. § 2072), which forbids the Supreme Court to prescribe rules which ‘abridge, enlarge or modify any substantive right,’ for the right affected is not a ‘substantive right’ within the meaning of that statute. Nor are the rules in conflict with Rule 82 which states that the Rules of Civil Procedure ‘shall not be construed to extend or limit the jurisdiction of the United States district courts’ for ‘jurisdiction’ as used in Rule 82 refers only to jurisdiction over the subject matter, not to jurisdiction over the person. * * *” *United States v. Montreal Trust Company*, (DC SD NY 1964) 35 FRD 216 at 219

Rule 4(i) should similarly be construed, according to its terms, to permit foreign service in all cases where a federal statute permits service beyond the district, and to provide for foreign service by registered mail in all such cases, a construction equally applicable to § 2361 and to § 1655.¹⁰

Rule 4 also supports foreign service by registered

10. The restraining order in this case bars only suits in domestic courts and has no application to proceedings elsewhere.

mail in this case, because Oregon law permits out-of-state service without territorial limitation in *quasi in rem* cases (ORS 15.110, 15.130).¹¹ Rule 4(i) provides the alternative manner of such service which was utilized in the trial court. 2 Moore's Federal Practice (2d Ed) 1249, fn 11 (Par 4.34(2)).

5. The action should not be dismissed.

Any defect in the manner or proof of service would in any case not justify reversal of the order or dismissal of the action, but would require merely that service be perfected. No procedural defect has been suggested on this appeal.

Davis v. Gahan, (DC SD NY 1964) 227 F Supp 867 at 872

Even if the court should determine that the trial court lacked interpleader jurisdiction over the Canadian claimants, it would not follow that the action should or could be dismissed. It should in any event proceed as a diversity suit to settle the rights of those who have become parties to it, either through personal service within the district or voluntarily following service elsewhere.

11. See cases cited in Advisory Committee comments on 1963 amendments to Rule 4, *supra*, n 9.

CONCLUSION

The need for interpleader relief in this case is critical and is consistent with judicial and public policy. Such relief would be ineffective in the absence of the order which is the subject of this appeal.

The judgment of the lower court should be affirmed.

Respectfully submitted,

McCOLLOCH, DEZENDORF &
SPEARS

JOHN GORDON GEARIN

JAMES H. CLARKE

*Attorneys for Appellee Grey-
hound Lines, Inc.*

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney.

FEB 10 1967

No. 20380

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH,
LILLIAN G. FISHER, BARBARA MCGALLIAND,
DORIS ROGERS, GAIL R. GREGG, RICHARD L.
WALTON, HEIR OF SUE M. WALTON, AND DONALD
WOOD,

APPELLANTS,

v.

APPELLEE.

STATE FARM FIRE AND CASUALTY COMPANY,

BRIEF FOR APPELLEE
STATE FARM FIRE AND CASUALTY COMPANY

*Interlocutory Appeal from Order
Denying Motion to Dissolve
Restraining Order of the
United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, JUDGE

FILED

NOV 18 1965

WILLIAMS, SKOPIL & MILLER
OTTO R. SKOPIL, JR.
9th Floor, Capitol Tower, Salem, Oregon
Attorneys for Appellee
State Farm Fire and Casualty Company

INDEX

	PAGE
Statement of the Case	2
Summary of Argument	2
The District Court did not commit any error of law when it concluded that there was proper jurisdiction over this cause and the appellants herein	2
A. The District Court has jurisdiction over the subject matter in an action in the nature of interpleader	2
B. The District Court has jurisdiction over all defendants, all prospective claimants	2
C. Personal service of the prospective claimants of the fund can be obtained under the provisions of Rule 4 (e) and (i) FRCP to support the injunctive relief granted by 28 USCA 2361	2
1. The service by registered mail of the Canadian defendants pursuant to Rule 4 (i) FRCP constituted personal service upon these defendants	2
2. The provisions of Rule 4 (i) FRCP are specifically supplementary to the provisions for service of process set forth in 28 USCA 2361	2
Conclusion	9
Certificate	9

TABLE OF CASES AND AUTHORITIES

Cases

<i>Commercial Union Insurance Co. of New York v Adams</i> , 231 F Supp 860 (1964)	4
<i>Denham v LaSalle-Madison Hotel Co.</i> , 168 F2d 576 (1948)	4
<i>Hanna v Plumer</i> , 85 S Ct 1136, 14 L ED2d 8	7

INDEX

	PAGE
<i>Hoffman Motors Corp v Alfa Romeo</i> , 244 F Supp 70 (1965)	8
<i>Kredit Pank v Chase Manhattan Bank</i> , 155 F Supp 30 (1957)	6
<i>Massachusetts Bonding & Ins Co v City of St. Louis</i> , 109 F Supp 137 (1952)	4
<i>New York Life Insurance Co v Lee</i> , 232 F2d 811 (1956)	4
<i>Pan American Fire & Casualty Co v Revere</i> , 188 F Supp 474 (1960)	4
<i>Republic of China v American Exp Co</i> , 168 F2d 576 (1948)	6
<i>San Rafael Campana Naviera S.A. v American Smelting & Refining Co</i> , 327 F2d 581 (1964)	6
<i>Securities & Exchange Commission v Briggs</i> , 234 F Supp 618 (1964)	8
<i>State v Pierce</i> , 100 NW2d 137, 257 Minn 114 (1959)	8

Federal Statutes

28 USCA 1335	2-3, 4
28 USCA 1397	3
28 USCA 2361	2, 4-5, 6, 8

Rules

Rule 4 (e) Federal Rules of Civil Procedure	2, 6, 8, 9
Rule 4 (i) (1) Federal Rules of Civil Procedure	2, 7, 8, 9

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH,
LILLIAN G. FISHER, BARBARA MCGALLIAND,
DORIS ROGERS, GAIL R. GREGG, RICHARD L.
WALTON, HEIR OF SUE M. WALTON, AND DONALD
WOOD,

APPELLANTS,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

APPELLEE.

APPELLEE'S BRIEF

*Interlocutory Appeal from Order
Denying Motion to Dissolve
Restraining Order of the
United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, JUDGE

STATEMENT OF THE CASE

The appellee adopts the statement of the case as contained in appellants' brief under "Summary of Facts" except that personal service by mail was obtained upon the defendants who are residents of Canada. It should also be noted that personal service was obtained upon the appellant Donald Wood by the United States Marshal for the Northern District of California on the 19th day of October, 1965.

SUMMARY OF ARGUMENT

The District Court did not commit any error of law when it concluded that there was proper jurisdiction over this cause and the appellants herein.

A. The District Court has jurisdiction over the subject matter in an action in the nature of interpleader.

B. The District Court has jurisdiction over all defendants, all prospective claimants.

C. Personal service of the prospective claimants of the fund can be obtained under the provisions of Rule 4 (e) and (i) of the Federal Rules of Civil Procedure to support the injunctive relief granted by 28 USCA 2361.

1. The service by registered mail of the Canadian defendants pursuant to rule 4 (i) FRCP constituted personal service upon these defendants.

2. The provisions of Rule 4 (i) FRCP are specifically supplementary to the provisions for service of process set forth in 28 USCA 2361.

ARGUMENT

A. This is a civil action brought in the nature of an interpleader. That the District Court has jurisdiction over such a civil action is apparent. 28 USCA 1335 provides:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the

nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of \$500 or more, or providing for the delivery or payment of the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of \$500 or more, if

“(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

“(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.”

The district court of the judicial district in which a civil action in the nature of interpleader under 28 USCA 1335 may be brought is prescribed definitely. 28 USCA 1397 provides:

“Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.”

The appellee insurance company, being threatened with a multiplicity of suits and double vexation even though it denies

coverage under its policy for the particular loss, had the right to assert the remedy afforded it under 28 USCA 1335 by filing in the District Court a bill in the nature of interpleader. This method has been considered and approved many times.

Pan American Fire & Casualty Co v Revere,

188 F Supp 474 (1960)

Commercial Union Ins Co of New York v Adams,

231 F Supp 860 (1964)

Massachusetts Bonding & Ins Co v City of St. Louis

109 F Supp 137 (1952)

New York Life Ins Co v Lee,

232 F2d 811 (1956)

Denham v LaSalle-Madison Hotel Co,

168 F2d 576 (1948)

The Court, in the *New York Life Ins. Co.* case, stated at page 814:

"Section 1335 adequately provides for interpleader for the protection of the insurance company and for the preservation and protection of the rights of the adverse claimants. The jurisdiction granted to the district court is not limited to an action of strict interpleader, but the provision is that the court shall also have jurisdiction of an action 'in the nature of interpleader'. See also Rule 22 F.R. Civ. P., U.S.C.A. This means that it was not required that the insurance company be a mere stakeholder having no claim or interest in the fund or property in dispute; but it might maintain its suit under the statute while still averring that it was not liable in whole or in part to any or all of the claimants."

B. The District Court has jurisdiction over all of the defendants, all possible adverse claimants.

It is apparent, under the statutory authority which forms the basis for the institution of a civil action in the nature of interpleader, that the District Court may issue its process to all claimants and also enter its order restraining them from instituting and proceeding in any State or United States court. 28 USCA 2361 provides:

"In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in the State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

"Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

It is evident that no distinction is made under the statute between residents and non-residents of the United States. Instead, the statute clearly authorizes service upon parties not an inhabitant of the state in which the district court is held. It states specifically that a "district court may issue its process for all claimants" and to restrain them from any proceeding "in any state or United States court".

The order to show cause entered by the District Court in this case on the 22nd day of January, 1965, was in fact directed to all claimants, which included residents and non-residents of the United States. The order provided in part:

"You, and each of you, are hereby ordered, within 10 days of service upon you of this order if served within the district of this court, or within 20 days if served within any other federal court district, or within 30 days if served outside of the United States,"

Appellants did, by their interpretation, limit jurisdiction in an interpleader action to only those cases where all the claimants can be served by a United States marshal. This, obviously, is not the intent or purpose of the statute authorizing civil actions of interpleader or in the nature of interpleader. Many are the cases

in which non-residents of the United States have been made parties to civil actions of interpleader:

Republic of China v American Exp Co,
108 F Supp 169 (1952)

*San Rafael Compania Naviera S.A. v American Smel-
tering & Refining Co.*,
327 F2d 581 (1964)

Kredit Pank v Chase Manhattan Bank,
155 F Supp 30 (1957)

C. The general principle cited by the appellants to the effect that interpleader is an in personam proceeding need not be argued. The power of the District Court has been set out in 28 USCA 2361.

1. Appellants present the argument that since interpleader is an in personam proceeding, personal service of the defendants is essential to the jurisdiction. Personal service has been obtained. Appellants are attempting to confuse personal service or in personam jurisdiction, with service of process which requires delivery by hand. Rule 4 (e) FRCP provides:

"Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule."

Rule 4 (i) (1) FRCP provides:

"When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service."

The recent amendments of Rule 4 FRCP have been construed by the Supreme Court of the United States in *Hanna v Plumer*, 380 U.S. 151, 85 S Ct 1136, 14 L Ed2d 8, wherein the provisions for personal service under Rule 4 FRCP were challenged. The Supreme Court, taking certiorari in order to have conformity within the federal courts, stated at page 1139:

"Actual notice is of course also the goal of Rule 4 (d) (1); however, the Federal Rule reflects a determination that this goal can be achieved by a method less cumbersome than that prescribed in §9. [requiring delivery by hand]."

Appellants' argument is based upon the supposition that personal service is only achieved by delivering the service upon the

party to be served by hand. Contrary to this premise there is adequate authority to support the position that personal service can be achieved by mail. *State v Pierce*, 100 NW2d 137, 257 Minn 114 (1959).

In personam jurisdiction of the defendants who are Canadian residents has been obtained pursuant to the conditions of Rule 4 (i) FRCP and consequently the Court has the jurisdiction to restrain these defendants.

2. Appellants next urge that 28 USCA 2361 is the exclusive provision for service and since the cited section does not provide for service in a foreign country, there is no method available for the appellee to obtain service in a foreign country. Appellee obtained service of the defendants who were residents of the foreign country pursuant to the provisions of Rule 4 (i) FRCP. The use of the methods available under the Rule 4 (i) FRCP has been challenged and upheld. *Hoffman Motors Corp v Alfa Romeo*, 244 F Supp 70 (1965); *Securities & Exchange Commission v Briggs*, 234 Supp 618 (1964). In the *Hoffman Motors* case the same argument that appellants present—the exclusive character of the statute permitting the process of the Federal District Court to extend beyond the geographical boundaries of the district—was urged. The Court found that Rule 4 (i) FRCP was supplementary and in addition to the statute which empowered the court to have effective process outside the district in which the court sat. In the *Securities & Exchange Commission* case the Court held that a service under Rule 4 (e) and (i) FRCP constituted in personam jurisdiction of a United States citizen served in Canada.

Rule 4 (e) and (i) FRCP appear for the first time in 1963. In the less than two years of their existence they have already been challenged in the Federal District Courts, the Courts of Appeals, and the United States Supreme Court on the grounds that the appellants here present. Whenever challenged, they have been upheld as establishing in personam jurisdiction and as a supplementary and additional methods of obtaining jurisdiction.

CONCLUSION

For the reason set forth hereinabove, the District Court would have jurisdiction over the subject matter and over the persons of all defendants, and in personam jurisdiction of the appellants was obtained in the manner provided under Rule 4 (e) and (i) FRCP, and the order denying the motion to dissolve the restraining order was proper.

Respectfully submitted,

WILLIAMS, SKOPIL & MILLER

OTTO R. SKOPIL, JR.

*Attorneys for Appellee
State Farm Fire and
Casualty Company*

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

OTTO R. SKOPIL, JR.

Of Attorneys for Appellee

State Farm Fire and Casualty Co.

No. 20380

FEB 10 1967

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH,
LILLIAN G. FISHER, BARBARA McGALLIAND,
DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON,
heir of SUE M. WALTON, and DONALD WOOD,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY, and
GREYHOUND LINES, INC.,

Appellees.

APPELLANTS' REPLY BRIEF

*Interlocutory Appeal from Order Denying Motion to
Dissolve Restraining Order of the
United States District Court for the
District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

GREEN, RICHARDSON, GRISWOLD & MURPHY,
JAMES B. GRISWOLD,

1003 Corbett Building, Portland, Oregon,
Attorneys for Appellants.

NELS PETERSON,
NICK CHAIVOE,

1000 S. W. Third Avenue, Portland, Oregon,
Attorneys for Appellant Donald Wood.

STEVENS-NESS LAW PUB. CO.



PORTLAND, ORE

FILED

12-65

JAN 6 1966

WILLIAM E. WILSON, Clerk

INDEX

	Page
Introduction	1
Argument	2
A. Interpleader is an <i>in personam</i> proceeding	2
B. Service by registered mail upon Canadian residents pursuant to Rule 4(i) was not valid	5
C. The court did not have jurisdiction over the Canadian defendants, and the motion to dissolve the restraining order and to dismiss the complaint should have been granted	8
Conclusion	9

TABLE OF CASES AND AUTHORITIES

Page

CASES

Aetna Life Insurance Company v. DuRoure, 123 F. Supp. 736	3
A. S. Krediit Pank v. Chase Manhattan Bank (D.C. S.D. N.Y. 1957), 155 F. Supp. 30, aff'd (C.A. 2 1962) 303 F.2d 648	4, 5
Hoffman Motors Corp. v. Alfa Romeo, 244 F. Supp. 70 (1965)	5, 6
New York Life Insurance Company v. Dunlevy, (1916), 241 U.S. 518, 521, 36 S. Ct. 613, 60 L. Ed. 1140	3, 5
Republic of China v. American Express, 108 F. Supp. 169, 170	3, 4
Securities & Exchange Commission v. Briggs, 234 F. Supp. 618 (1964)	5, 6
United States v. Cardillo (D.C. W.D. Pa. 1955), 135 F. Supp. 798	8

STATUTES

3 Moore's Federal Practice, 2d Ed., ¶ 22.06	3, 5
15 U.S.C. § 22 (Robinson Patman Act)	6
15 U.S.C. § 77v(a)	7
28 U.S.C.A. § 1355	9
28 U.S.C.A. § 1655	5
28 U.S.C.A. § 2361	7, 8
ORS 15.110	7
ORS 15.130	7

RULES

Rule 4 (i), Federal Rules of Civil Procedure	5, 6, 7
--	---------

United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, et al,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
and GREYHOUND LINES, INC.,

Appellees.

APPELLANTS' REPLY BRIEF

*Interlocutory Appeal from Order Denying Motion
to Dissolve Restraining Order of the
United States District Court
for the District of Oregon*

HONORABLE WILLIAM G. EAST, Judge

INTRODUCTION

The briefs heretofore filed by the parties include Statement of Jurisdiction, Statement of the Case and Specification of Errors. Appellee State Farm Fire and Casualty Company, hereinafter referred to as "State Farm," adopted appellants' Statement of Jurisdiction and Statement of the Case. Greyhound Lines, Inc., hereinafter referred to as "Greyhound," included in its brief an additional statement of jurisdiction and a supplemental statement of the case. It is unnecessary to make

any comments regarding these portions of any of the briefs.

Appellants will set forth the specifications of error as they appeared in their original brief.

ARGUMENT

A. Interpleader is an *in personam* proceeding.

1. State Farm, at page 6 of its brief, states that appellants' position that interpleader is an *in personam* proceeding need not be argued. State Farm then attempts to convert appellants' argument to indicate it is appellants' position that personal service of the various defendants is essential to jurisdiction. The question is not whether the delivery of the complaint and restraining order by registered mail to the Canadian residents is sufficient service of process. It is appellants' position that the United States District Court does not have jurisdictional power, regardless of the method of service, to render an effective restraining order as against residents of Canada. It is appellants' position that the Canadian residents are necessary parties, and the inability to bring them before the Court renders the entire proceeding invalid.

Greyhound, in its brief, at page 17, refers to appellants' position as one of complaint of some procedural defect which would merely require that the method of service be corrected and perfected. This attempted restatement of appellants' position by Greyhound is a misinterpretation of appellants' basis for this appeal.

On page 13 of Greyhound's brief, it is stated that
 “* * * it has repeatedly been held that an indebtedness
 in the form of a fund is a sufficient *res* to support juris-
 diction under § 1655 * * *.”

To test this statement, one must decide whether State Farm's deposit with the Clerk of the Court is a “fund.” In appellants' brief, the case of *Aetna Life Insurance Company v. DuRoure*, 123 F. Supp. 736, was cited. Appellants did not include the quotation from page 740. It completely answers Greyhound's argument. This quotation follows a discussion of the *New York Life Insurance Company v. Dunlevy* decision (1916), 241 U.S. 518, 36 S. Ct. 613, 60 L. Ed. 1140. The quotation was from 3 Moore's Federal Practice (2d ed.), ¶ 22.06, as follows:

“ ‘While a court may obtain in rem or quasi in rem jurisdiction over adverse claimants to a specific *res*, such as the corpus of a trust estate, a fund, securities, or other chattels, a person against whom in personam liability is asserted may not transform that liability into a *res* by depositing money into court and thus enable the court to proceed to an adjudication, by in rem or quasi in rem process, of the defendants' in personam claims against the plaintiff. This was the teaching of the *Dunlevy* case.’ ”

“See also *Hanna v. Stedman*, 230 N.Y. 326, 130 N.E. 566.”

Greyhound further states that its position is supported by “repeated” decisions, then cites two cases: *Republic of China v. American Exp. Co.*, (D.C. S.D. N.Y. 1951), 95 F. Supp. 740 at 743-744, *aff'd* (C.A. 2

1952), 195 F.2d 230, opinion on remand (D.C. S.D. N.Y. 1952), 108 F. Supp. 169. *A/S Krediid Pank v. Chase Manhattan Bank* (D.C. S.D. N.Y. 1957), 155 F. Supp. 30, aff'd (C.A. 2 1962), 303 F.2d 648.

Note that Greyhound's interpretation of the *Republic of China* case refers to it as a claim against a bank account. The *Republic of China* case involves three decisions, the first appearing in 95 F. Supp. 740, the second in 195 F.2d 230, and the last in 108 F. Supp. 169. The decision states, at 95 F. Supp., page 742, that the fund originated from the establishment of a credit balance with the American Express Company. The entire issue in the first decision was whether the circumstances of the case were such that an interpleader would probably lie, and the District Court held that it would. The decision of the court went no further. This opinion was appealed to the Circuit Court of Appeals for the Second Circuit, and the decision holding that the interpleader was proper was affirmed. The matter was then remanded to the District Court for further proceedings. The next opinion is reported in 108 F. Supp. 169, and at this stage, the Court ordered that the matter be remanded to the Calendar Commissioner, and was not to be restored for trial until there was proof of jurisdiction over all defendants directed to be brought in by the judgment of interpleader. These defendants included a John Doe and a Richard Roe and a foreign government. The Court held, at page 170, that there was no showing of proper service, this being the reason the cause was held in abeyance.

It is submitted that this is hardly valid authority

for Greyhound's proposition that indebtedness in the form of a fund is a sufficient *res* to support jurisdiction under 28 U.S.C.A. § 1655.

In the *A/S Krediid Pank* case, 155 F. Supp. 30, the "fund" consisted of cash on deposit and securities. The Court, at page 36, authorized service pursuant to 28 U.S.C.A. § 1655, and felt that this method of service would be proper because

" * * * the securities now held by Chase for this account plainly constitute personal property within the district to which a claim has been asserted."

It is submitted that the *A/S Krediid Pank* case is not support for appellee's position, and most assuredly does not provide bases for this Court to overlook the *Dunlevy* decision and the quotation from Moore's Federal Practice, set forth above.

B. Service by registered mail upon Canadian residents pursuant to Rule 4 (i) was not valid.

Appellants have discussed their position on pages 8-13, inclusive, of their original brief. State Farm, on page 8 of its brief, indicates that such use of Rule 4 (i), F.R.C.P., has been challenged and upheld. State Farm relies on *Hoffman Motors Corp. v. Alfa Romeo*, 244 F. Supp. 70 (1965) and *Securities & Exchange Commission v. Briggs*, 234 F. Supp. 618 (1964). The *Hoffman Motors* case, at page 77, at the beginning of headnotes 9 and 10, states as follows:

"[9, 10] The Automobile Dealers Act (15 U.S.C. §§ 1221-1225) contains no special provision for service of process."

Accordingly, the court permitted service upon an Italian corporation pursuant to the New York statute providing for service upon a "nondomiciliary" who "transacts any business within the state." The other act involved was the Robinson Patman Act, which contained a special provision concerning service of process (15 U.S.C. § 22), providing that process may be served "in the District of which (defendant corporation) is an inhabitant, or wherever it may be found."

In the first situation, Rule 4 (i) was brought into play because the statute was silent as to service. In the second situation, the statute provided for the method of service and was followed. Despite State Farm's interpretation of the *Hoffman Motors* decision, examination will indicate that it does not support its position. At page 78, the Court makes the following comment (The initials S.p.A. refer to the Italian corporation):

"S.p.A. does not dispute that it was properly served under the New York statute, if that statute applies. It takes the position, however, (1) that Rule 4(f), F.R.C.P., limits service to New York State and therefore extraterritorial service is invalid, and (2) assuming the applicability of state law, that it did not transact business within the state as required by § 302(a), C.P.L.R., and therefore could not be served in Italy under it. Both contentions are without merit."

In *Securities & Exchange Commission v. Briggs*, 234 F. Supp. 618, service was made upon an American citizen in Canada, the question being whether the Court had power to take *in personam* jurisdiction over one of its

citizens not physically present within the United States when served with process. The service was made under 15 U.S.C. § 77 v (a), stating:

“* * * process in such cases may be served in any other district of which the defendant is an inhabitant *or wherever the defendant may be found.*’ (77v(a)) (Emphasis added.)”

Greyhound, at page 15 of its brief, argues that Rule 4 (i) provides an alternate mode of service to that provided in 28 U.S.C.A. § 2361. Also, at page 17 of its brief, Greyhound makes reference to ORS 15.110 and 15.130. The reference to the Oregon statutes is most misleading, as the adoption of Rule 4 (i) was to permit the use of state “long-arm” and nonresident motorist statutes in federal court, and the Oregon sections referred to have to do with cases where the Court has jurisdiction of the subject matter of the action (ORS 15.110) and in suits in equity when the subject of the suit is real or personal property in the State of Oregon, or is for divorce, etc. (ORS 15.130).

It is appellants’ position that Rule 4 (i) does not provide an alternative or an additional mode of service; the provisions of 28 U.S.C.A. § 2361 control the method of serving process on all parties in this cause.

C. The Court did not have jurisdiction over the Canadian defendants, and the motion to dissolve the restraining order and to dismiss the complaint should have been granted.

(a) Many of the cases referred to by defendant State Farm, on page 6 of its brief, in opposition to appellants’

position, have already been discussed under Assignment of Error No. 1. Appellee Greyhound interprets appellants' position to be that Section 2361 prohibits service outside of the United States (Greyhound's Br., p. 9).

The issue here has nothing to do with statutory prohibitions regarding service, but rather that there is no provision for such service. Service outside the United States, however, accomplished, does not give the Court jurisdiction in this cause. It is the responsibility of the plaintiff bringing this or any other proceeding in Federal Court to establish jurisdiction, and this has not been done.

Greyhound, at page 10 of its brief, makes reference to *United States v. Cardillo*, (D.C. W.D. Pa. 1955) 135 F. Supp. 798. Service was made in this denaturalization proceeding by means of registered mail and publication, in which latter instance the proper address of respondent was not set forth. The Court found that the publication was defective, but the defect was cured by the registered notice. In that case, respondent was relying upon a technical defect, and to avoid its effect, the Court adopted a liberal construction of the notice portion of the statute. Appellants are not here complaining of a technical defect; appellants assert that 28 U.S.C.A. § 2361 does not require any interpretation or construction, but requires service within the United States.

CONCLUSION

Appellee Greyhound, at page 17 of its brief, contends that even if it be found that the United States District Court for the District of Oregon did not have interpleader jurisdiction over the Canadian residents, this action should not be dismissed, and the State Farm and Greyhound should be permitted to retain the restraining order and maintain the cause under the Interpleader Act. In taking this position, the appellees overlook the basic right of these appellants to bring and maintain actions for their injuries and for deaths, in any forum which they may choose. The convenience of these appellees and their supposed "critical need for interpleader relief" (Greyhound's Br., p. 6) are not matters which should control the holding in this cause.

The sole issue is whether this proceeding can properly be brought and maintained under the Interpleader statute, or under 28 U.S.C.A. § 1335, and appellants submit that for the reasons contained herein, the order of the lower court should be reversed, and the restraining order dissolved, and the complaint dismissed.

Respectfully submitted,

GREEN, RICHARDSON, GRISWOLD & MURPHY
JAMES B. GRISWOLD
Attorneys for Appellants
NELS PETERSON
NICK CHAIVOE,
Attorneys for Appellant
Donald Wood

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

JAMES B. GRISWOLD

Of Attorneys for Appellants.

FEB 10 1967

No. 20834 ✓

IN THE
**United States Court of Appeals
For the Ninth Circuit**

BAKER & FORD Co., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANTS

MIKE STEPOVICH
Attorney at Law
Fairbanks, Alaska

FILED

BRUCE T. RINKER
Attorney at Law
317 Bellingham Nat'l Bank Bldg.
Bellingham, Wash.

JAN 28 1967

Attorneys for Appellants

WM. B. LUCK, CLERK

SUBJECT INDEX

	<i>Page</i>
Jurisdictional Statement	1
Statement of the Case	2
Specification of Errors	8
Summary of Argument	19
Argument	22
Part One—Acceleration	22
Part Two—Items of Work	54
Part Three—Prior Agreement in Writing as to Extras	59
Part Four—Interest	62
Part Five—Attorney fees	63
Part Six—Bond Premium, Business Tax, Overhead and Profit	64
Part Seven—Jurisdiction	64
Conclusion	65
Certificate of Compliance	68
Appendices:	
Appendix A—Appellee's Exhibits	App. 1
Appendix B—Appellant's Exhibits	App. 5

TABLE OF CASES

<i>Adam J. Lanehart v. United Enterprise, Inc.</i> , 226 F.2d 359	53
<i>Bisno v. U.S.</i> , 299 F.2d 711, (9th C. A. 1961)	28

	<i>Page</i>
<i>Central Steel Erection Co. v. Will</i> , 304 F.2d 548 (9th C. A. 1962).....	27-28, 41, 42, 62
<i>Daniel v. U. S.</i> , 343 F.2d 785 (5th C. A. 1965).....	29
<i>Hill v. Waxberg</i> , 237 F.2d 936, (9th C. A. 1956).....	27
<i>Hoffer Oil Corp. v. Carpenter</i> , 34 F.2d 589, (10th C. A. 1929).....	50
<i>Kincaid and King Construction Co., Inc. v. U. S.</i> for Use of Olday, 333 F.2d 561, (9th C. A. 1964)....	29
<i>Macri and Sons v. U. S.</i> , 313 F.2d 119, (9th C. A. 1963).....	27, 63
<i>Northern Truck Line v. Dunn</i> , 167 F.2d 650, (9th C. A. 1948) 11 Alaska 583.....	27
<i>O'Keefe v. Corp. of St. Francis Church</i> , 59 Conn. 551, 22 Atl. 325, 66 A. L. R. 664.....	28
<i>Plymouth Village Fire District v.</i> New Amsterdam Casualty Co., 130 F. Supp. 798....	29, 50
<i>Scholes Inc. v. U.S. for the use of H. W. Moore</i> Equipment Co., 295 F.2d 366, (10th C. A. 1961)....	50
<i>Standard Oil Co. of California v. Moore</i> , 251 F.2d 188, (9th C. A. 1957).....	28
<i>Unicon Management Corp.</i> , 65-1 BCA, para. 4827.....	59
<i>U.S.A. for General Electric Co. v. Brown Electric Co.</i> , (D.C. Virginia 1959), 168 F. Supp. 806.....	64
<i>U.S.A. for Miller and Bentley v. Kelly</i> , 192 F. Supp. 274.....	64
<i>U. S. v. Hensler</i> , 125 F. Supp. 887 (1954).....	54
<i>U. S. v. Jones</i> , 176 F.2d 278 (9th C. A. 1949).....	49
<i>Willems Industries Inc. v. U.S.</i> , 295 F.2d 822 (1961) U.S. Ct. of Claims.....	49-50

STATUTES

	<i>Page</i>
28 USC Rule 52(a)	22
28 USC 1291	2
28 USC Sec. 1331-1332	1, 64
28 USC 1732a	28
40 USC Sec. 270a-270e.....	1, 2, 64
Sec. 270b	65

ANNOTATIONS & TEXTBOOKS

66 A.L.R. 649.....	60-62
9 Am. Jur., <i>Building and Construction Contracts</i> , para. 141	28
I Wigmore 3rd Edition 718.....	49
Wigmore 3rd Edition, § 657(a), 658(b)(3).....	48-49

IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 20834

BAKER & FORD Co., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

Appellee-plaintiff, brought this action against appellants-defendants, in the United States District Court for the District of Alaska at Anchorage alleging jurisdiction under Act of Congress of August 25, 1953 (commonly known as the Miller Act) 40 U.S.C. Sec. 270a-270e and under 28 U.S.C. Sec. 1331 and 1332 (R. 33¹).

1. Note: Herein "R" refers to Volume 1 of the Transcript of Record being the court papers (R. 1-178) and "T" refers to Volume 2, being the Transcript of Proceedings before the District Court (T. 1-773).

IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 20834

BAKER & FORD CO., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING CO.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

Appellee-plaintiff, brought this action against appellants-defendants, in the United States District Court for the District of Alaska at Anchorage alleging jurisdiction under Act of Congress of August 25, 1953 (commonly known as the Miller Act) 40 U.S.C. Sec. 270a-270e and under 28 U.S.C. Sec. 1331 and 1332 (R. 33¹).

1. Note: Herein "R" refers to Volume 1 of the Transcript of Record being the court papers (R. 1-178) and "T" refers to Volume 2, being the Transcript of Proceedings before the District Court (T. 1-773).

Appellants denied the jurisdictional allegations. (R. 41).

The trial court found that appellee was a corporation having its principal office and place of business in Portland, Oregon; that appellant Baker & Ford Co. is a Washington corporation having its principal place of business in Bellingham, Washington; and that appellant Fidelity & Casualty Company of New York is a corporation organized under the laws of the State of New York transacting business as a surety company in Alaska (R. 82-83). The trial court further concluded that it had jurisdiction of the subject matter and the parties under the Act of Congress of August 24, 1935, 40 U.S.C. 270(a)—270(e) commonly known as the Miller Act, and had ancillary jurisdiction over the parties with reference to appellee's claim for repairing water leaks (R. 91).

This appeal pursuant to 28 U.S.C. 1291, was timely noticed (R. 167).

STATEMENT OF THE CASE

Baker & Ford Co., hereinafter referred to as appellant, during the years 1959, 1960 and 1961, was engaged as prime contractor under numerous different contracts in the construction of space detection facilities, commonly referred to as a Ballistic Early Warning Missile Site (B.E.W.M.S.) at Clear, Alaska, under contracts with the United States Department of Defense through the Corps of Engineers. The total volume of work accomplished by appellant was in excess of \$20,000,000.00.

One of the contracts was identified as DA-92-507-eng-1302, referred to in this record as "1302," which was for a composite building consisting of two dormitory wings with eating and recreational facilities lying between. This contract was for the amount of \$3,666,-499.00. Appellee was the mechanical subcontractor on this contract, the amount of its subcontract being \$669,-500.00. Appellee was also doing subcontract work for other prime contractors on the site but with one minor exception (having reference to Contract 1298 with which we are not here concerned) and miscellaneous force account work, (referred to as temporary work in the record) the only work performed for appellant by appellee under contract related to 1302.

The subcontract between the parties (Ex. H) dated June 25, 1959, provided:

"3. That the labor and materials to be furnished, and the work to be performed by the subcontractor are as follows: *All mechanical work* for a complete installation on Contract DA-95-507-eng-1302 . . ."
(Italics ours).

Work was commenced in June 1959 but because of strikes on the part of two crafts, very little progress was made during the summer of 1959. (All outside work must be done in the late spring, summer, and early fall on account of the weather in this area, which is approximately sixty miles from Fairbanks).

Recognizing that the original completion dates hereinafter set forth could not be met, the Government and Baker & Ford entered into discussions as to when the

job could be completed, this particular job being extremely important with respect to activation of the rest of the site, as it provided the housing for the operating personnel. These discussions continued on into June of 1960 with different agreed completion dates.

Following is a summary of agreed completion dates:

The original contract called for final completion on May 31st, 1960 (Ex. O).

Exhibit 38, letter from the Corps of Engineers dated October 9, 1959, requests August 31, 1960, completion. This not appearing feasible, the parties subsequently agreed, in January of 1960, to fix the completion dates on a phase basis, as follows:

First wing, October 15, 1960

Second wing, November 15, 1960

All other, December 15, 1960

(Exs. 27, 28). This change was formalized in Mod. 6. Just prior to the commencement of the 1960 construction season, on April 29th, the contractor and the Government agreed that an earlier delivery date was practical (Ex. 25). The agreement for the new completion dates was formalized by Mod. 11 (Ex. 26), dated June 27, 1960. The new completion dates which were ultimately substantially complied with provided for completion as follows:

First wing, September 15, 1960

Second wing, October 15, 1960

All other, November 15, 1960

Appellee brings this action, among other things, to recover for claimed additional costs by virtue of the Government and the appellant moving the phase completion dates up by one month or, as it states in its complaint, because of a direction to appellee to "expedite and accelerate the work in order to complete the same in advance of the time allowable under the terms of the subcontract, "asking additional costs in the sum of \$137,-254.96. (Supplementary Complaint, paragraph X, R. 36). The court, in its Findings of Fact, paragraphs XI, XII, XIII, XIV, XV and XVI, (R. 87-89), found in favor of appellee and assessed the amount of \$80,519.24 as the reasonable value of the "extra work required of use plaintiff in accelerating the work . . ."

Appellant, by its answer (R. 41, 42) denied that it had directed the plaintiff to accelerate its work and through all of the witnesses involved, both appellants' and appellee's, established that appellant had prepared, on April 8, 1960, a construction schedule to be met by the prime contractor and all subcontractors which construction schedule was disseminated to all subcontractors on April 22, 1960 (Ex. 1). Further that this construction schedule, notwithstanding any agreements with the Government, called for completion dates as follows:

First wing, September 15, 1960

Second wing, October 15, 1960

All other, October 15, 1960

thus calling for final completion two months prior to that agreed to by Mod. 6 and one month prior to that

ultimately agreed to by Mod. 11 (Ex. 26). All of the testimony is to the effect that good construction planning practice, particularly in cold-weather country and where \$2,000.00 per day liquidated damages are present in the contract, (Ex. O), calls for establishing as early a target date as is possible. (Tr. 64-5; 128-9; 392, 397-400; 431). This construction schedule was agreed to by the contractor and all subcontractors and was the only master schedule from which they worked from April to completion, notwithstanding different dates established by agreement between appellant and the Government (T. 64; 126-128). In fact, appellee had no knowledge of the existence of any other agreed completion dates (Mods. 6 and 11), until February, 1961, long after the job was completed (T. 110-112, 125-126, 274).

The precise question involved with respect to this claim of appellee is whether, under the terms of the subcontract (Ex. H) particularly paragraphs (d) and (e), (1) the contractor ordered "extra work or made changes by altering, adding to or deducting from the work" included in the subcontract by executing Mod. 11; (2) the subcontractor incurred additional costs as a result thereof of the reasonable value found by the court and (3) the impact of paragraph (e) of the subcontract, to the effect that no claims for extras should be made unless fully agreed upon in writing prior to the performance of any such extra work.

Additional questions involved relate to Findings VII (a), (b) and (c) (R. 84-85) having respect to extra work. Appellee, in its supplementary complaint, (R. 33-

38), alleged that these items, among others, were over and above the subcontract requirements and constituted extra work under paragraph (d) of the subcontract. Appellant, by its answer (R. 41-42) denied, taking the position that all of the work required was "plumber's work," under the jurisdiction of the United Association of Plumbers and Steamfitters, and that the language of the subcontract requiring subcontractor to furnish "all mechanical work for a complete installation" together with the pertinent specifications, placed this work within the scope of the subcontract.

So, with respect to these latter items, the precise question is whether, in fact, (1) they were extra work, (2) done at the appellant's request, (3) agreed upon in writing prior to the performance of such work, and (4) the evidence adduced on behalf of appellee was sufficient to establish the reasonable value thereof.

The remaining item, Finding VII(d), (R. 85) repair of water main leaks, involves the same questions and in addition, raises a further question.

Under all of the testimony, this work was done as force account work on a pre-existing camp, not a part of Contract 1302. Under these circumstances, the court did not award judgment against appellants jointly but only as against appellant, Baker & Ford Co., the work not coming within the scope of the Miller Act.

Baker & Ford contend that they, having raised the jurisdictional question by their answer, (R. 41-42) and the appellant and appellee both being out of state cor-

porations, the court had no jurisdiction whatsoever with respect to this item.

Further, there is no competent proof as to the reasonable value of the amount claimed and awarded, or that appellant directed the repair of more than one of the three leaks involved.

SPECIFICATIONS OF ERRORS

1. The court erred in entering the following Findings of Fact: (R. 82-93):

A. *Finding VI.* (R. 84). As shown by Finding V, the last work performed under the contract in question by appellee was in October 1961. The original complaint was filed October 31, 1961, less than ninety days from the date on which the last of the labor was performed and material furnished by appellee.

B. *Findings VII(a) and (b)* (R. 84-5). These items were not extra work under the contract documents consisting of the plans, (Ex. 30) specifications (Ex. II 1-2) and subcontract (Ex. H), and no competent testimony was given as to the reasonable value of the work performed and material furnished.

C. *Finding VII(c)* (R. 85). This item was not extra work under the contract documents consisting of the plans, (Ex. 30) specifications (Ex. II 1-2) and subcontract, (Ex. H) was not ordered at the special instance and request of the appellant, (T. 45) and there was no evidence whatsoever regarding the reasonable value of the alleged extra work.

D. *Finding VII(d)* (R. 85). This was not extra work under Contract 1302 or under the subcontract; the charge is allegedly for repairing three leaks, while the testimony relating to the work being done at the special instance and request of appellant has reference to only one leak and the testimony respecting the reasonable value having reference to only one leak.

E. *Finding IX* (R. 85-6). All of Finding IX is erroneous with the exception of the fact that the appellant did agree with the United States, on or about April 29, 1960 (Ex. 25) informally, to accelerate the previously fixed completion dates by one month each. Modification Number 11 (Ex. 26) dated June 24, 1960 and executed on June 27, 1960, included a price which set forth an increase in contract price based on Exhibit 25 as consideration for the general contractor advancing completion date by one month, "evacuate warehouse 'B' and turn over to the resident engineer by not later than 6 May 1960" and the price "to include the cost of a temporary warehouse structure" to be "dismantled and removed by 30 November 1960." The court erred in giving consideration to the price set forth in Exhibit 26 and even when doing so, not taking into consideration the costs of evacuation of warehouse, re-erection and dismantling. The court also erred in making the findings contained in the last two full sentences of IX relating to the furnishing and erecting of camp facilities in connection with Contract 1282 with which appellee was not involved and in finding that said Modification Number 32 (Ex. 34-35) included additional *maintenance* for the

acceleration of Contract 1302, Mod. 32 having reference solely to additional work with respect to Contract 1282 and providing only for additional housing and messing facilities which were originally government furnished.

F. *Finding X* (R. 86-7). As appellee had agreed to schedule his work under the general contractor's construction schedule in April 1960, (Ex. 1) which called for all outside utility work to be completed by September 15, 1960, the setting up of completion dates per Mod. 11 (Ex. 26) did not in any wise alter said previously agreed to construction schedule.

Neither was the work of appellee's subcontractor, Read Sheet Metal Works, accelerated. His increased cost proposal (Ex. 17) was based on a September 15, 1960 final completion (T. 83-5). He actually completed on September 19, 1960 (T. 83-4). He had until October 15, 1960, to complete, in which event there would have been no additional costs (T. 83-5).

G. *Finding XI* (R. 87). There is no support in any of the evidence for the finding that appellant directed and required appellee to accelerate as set forth. All of the testimony is that no such directions were ever given (T. 66, 129-31, 275-6, 276-7). Neither is there any competent testimony respecting the means to accomplish said acceleration as set forth in the last full sentence of this finding, the weight of the testimony being to the effect that moving the schedule up by one month out of the winter season would, in fact, result in no additional costs (T. 409-11).

H. *Finding XII* (R. 87). The evidence preponderates against the factual findings herein contained; neither was the last change of dates a change in the parties' subcontract; neither was the construction schedule referred to in Finding VIII (Mod. 6) a matter of contemplation of the parties as appellee had no notice or knowledge of its existence.

I. *Finding XIII* (R. 87). There was no competent testimony to support this finding. The admission of appellee's Exhibit 29, on which the finding is partially based, was objected to (R. 55-7). The testimony in support thereof, given only by Mr. Urban, was incompetent in that he was without personal knowledge of the facts on which his opinions or estimates of scope and value were based; appellee having failed to sustain its burden of proof and the evidence preponderating against it.

J. *Finding XIV* (R. 88). Appellee failed to sustain its burden of proof with respect to this finding and the evidence preponderates against it, and any such additional costs were not incurred at the special instance and request of appellant.

K. *Finding XV* (R. 88). There is no evidence showing an obligation of appellee to pay the Alaska Business Tax or bond premium of 1 per cent referred to, any obligation respecting the bond premium being that of Baker & Ford directly to the bonding company (Ex. H). Neither is the allowance for overhead and profit proper as they are excessive and computed on items which per se include overhead and profit.

L. *Finding XVI* (R. 88). There is no competent evidence of the increased costs herein set forth or the reasonable value of accelerating the work specified for the reasons herein set forth.

M. *Finding XVIII* (R. 89). The evidence preponderates that appellant was not indebted to appellee in any sum save and except items of an unliquidated nature and no interest is due. Item Number 3 of Exhibit 31, being interest in the amount of \$937.23 computed on the principal amount of \$17,851.55, has reference to *temporary work*, (T. 96, 118-120) (See first paragraph of Ex. U) which is not a part of Contract 1302, thus not within the trial court's jurisdiction.

Further, there is no showing when any amount set forth on Exhibit 31 became due under the payment clause of the subcontract. Paragraph (c), Ex. H, provides:

"Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work. . . ."

The court found (*Finding V*, R. 83) that appellee did not complete its work under the subcontract until October, 1961, yet it allowed interest from January 1, 1961 (*Ex. 31*).

N. *Finding XIX* (R. 90). Appellee has not sustained its burden of proof in this regard and the evidence preponderates against this finding. In fact, on only one occasion was a verbal order given, that being after the job was completed (T. 97, 121).

O. *Finding XX* (R. 90-91). The files and records

demonstrate the erroneousess of this finding, as considering the amount sued for and the amount appellee is entitled to recover, even assuming this court affirms the lower court in toto, the appellants would still be the prevailing parties.

P. *Finding XXI* (R. 91). The evidence clearly shows that as to the second full sentence it should read, "plaintiff additionally used approximately 2851½ man camp days subsistence in the performance of all its contracts and work at the site."

II. The court erred in entering the following Conclusions of Law (R. 91, 92):

A. *Conclusion I*. This action was brought prematurely under the Miller Act and the court did not obtain jurisdiction ancillary of appellant, Baker & Ford Co. respecting appellee's claim for repairing water main leaks.

B. *Conclusion II*. For the reasons set forth in I. B, C, E, F, G, H, I, J, K, L, M and N above.

C. *Conclusion III*. For the reasons set forth in I. D, above.

D. *Conclusion IV*. For the reasons set forth in I. O, above.

III. The court erred in entering paragraphs 1 and 2 of the Judgment (R. 94) for the reasons set forth in paragraphs I and II above.

IV. The court erred in failing to grant appellant's Motion for New Trial (R. 96) for all of the reasons set forth herein.

V. The court erred in failing to grant appellant's Motion for Amendment of Findings (R. 97) for all of the reasons set forth herein.

VI. The court erred in failing to enter appellants' Proposed Amended Findings of Fact and Conclusions of Law (R. 101-105) for all of the reasons set forth herein.

VII. The court erred in admitting the following exhibits over the objection of appellants, the admission of which was prejudicial to the rights of appellants.

A. *Exhibit 3*. Letter dated 8-3-59 to Baker & Ford from Urban Plumbing & Heating, respecting repairs to water line (T. 60). Objected to on the grounds that "there is no proper foundation as to who prepared the breakdown of costs set forth therein or from what information such breakdown was obtained" (R. 55).

B. *Exhibit 19*. Invoice, Urban to Baker & Ford dated November 18, 1960 (T. 40-41). Objected to as "no proper foundation showing by whom or from what source this invoice was prepared" (R. 57). The witness, Martindale, merely identified the time sheet accompanying the invoice without any substantiations as to reasonableness of the entries.

C. *Exhibit 21*. Invoice, Urban to Baker & Ford dated November 18, 1960 (T. 39). Objected to as "no proper foundation showing by whom or from what source this invoice was prepared" (R. 57). The witness, Martindale, not filling in this gap nor testifying as to the reasonableness of the items going to make up the invoice.

D. *Exhibit 29*. Consisting of summary and eight schedules setting forth appellee's acceleration claim (T. 187-277). Objected to as "no proper foundation showing the sources of figures used throughout the exhibit or by whom prepared; is a self-serving document if prepared by Urban employees;" (R. 57) further objected to throughout the direct and redirect examination of witness, Urban, (T. 187-234, 278-287, 290-293) on the grounds that the schedules were mere estimates on the part of witness, Urban, based on hearsay, he not having personal knowledge of the alleged facts from which the conclusions were drawn. Neither were any supporting books, records or invoices introduced or made available for examination from which the various schedules were supposedly prepared (T. 571-2).

E. *Exhibit 34*. Change order, Modification Number 32, Contract 1282, dated 24 June 1960 (T. 298-300). Objected to (T. 299, R. 57) as being incompetent, irrelevant and immaterial, this relating to a contract separate and apart from 1302. It is apparent from the argument of appellee's counsel for its admissibility (T. 299-300) that the exhibit is for the purpose of showing what monies appellants received on the various other jobs at Clear which could have no bearing on the rights of these parties with respect to Contract 1302.

F. *Exhibit 35*. Change order, Contract 1282, dated 3 February 1961 (T. 298-300). Objected to (T. 299 (R. 57), as being incompetent, irrelevant, immaterial, this relating to a contract separate and apart from 1302.

It is apparent from the argument of appellee's counsel for its admissibility (T. 299-300) that the exhibit is for the purpose of showing what monies appellants received on the various other jobs at Clear which could have no bearing on the rights of these parties with respect to Contract 1302.

G. *Exhibit 41*. Communications between Alaska District Engineer and Alaskan Air Command dated 30 March 1960, 21 April 1960 and 28 April 1960 (T. 404). Objected to as being records of others not a party to this action, with no showing of notice or acquiescence on the part of the parties to this action and as being heresay, (T. 402-404) and as being incompetent, irrelevant and immaterial (R. 57).

VIII. The court erred in admitting the following testimony which was objected to:

A. Testimony of Robert E. Brewer to the effect that the amount referred to on Exhibit 3 for repair of three water main leaks was the fair and reasonable cost, the objection being made that "the witness testified he was only present at one break, and there is no proper foundation that he is acquainted with the three breaks that were mentioned, as to what went into them"(T. 100-101).

B. Testimony of Fred Urban respecting how much appellee's total labor cost on Contract 1302 overran appellee's estimate. Objected to as not being the best evidence (T. 190-191).

C. Testimony of Fred Urban re total man days on

Contract 1302. Objected to on the ground that no proper foundation laid and no showing that the claimed additional man days were used on Contract 1302 (T. 193-194).

D. Testimony of Fred Urban to the effect that \$4,349.81, as shown on Schedule IV, Exhibit 29, was a fair and reasonable charge for expediting freight. Objected to on the ground that no proper foundation was laid; that the witness had no knowledge concerning this matter, he having just compiled the figures furnished by another person (T. 209-210).

E. Testimony of Fred Urban re additional man days for increased subsistence, Schedule VIII, Exhibit 29, \$12,600.00. The witness testified that this calculation was made by a Mr. Way (T. 215-216, 261). Objected to as hearsay and there being no proper foundation (T. 216-217).

F. Testimony respecting Contract 1282 and the amounts thereof given by F. Murray Haskell. Objected to as not being material or relevant to the issues in this case (T. 532-33).

G. Testimony of Fred Urban respecting the contents of eight schedules and the summary of Exhibit 29, objection to said exhibit having been made at the outset of the trial (R. 57) and objections to the exhibit and testimony relating thereto having been made throughout the direct and redirect examination of the witness on the grounds that said exhibit and the testimony relating thereto were mere estimates on the part of the wit-

ness, Urban, based on heresay, he not having personal knowledge of the alleged facts from which the conclusions were drawn (T. 187-234, 278-287, 290-293).

IX. The court erred in sustaining objections to the following questions:

A. Question to L. A. Bernardi on behalf of appellants:

“Q. Will you state whether or not the piping and hook-up of that kitchen equipment as relating to bringing in the water and sewer and the rest of it is plumber’s work?”

Objection was made on the ground that this was a conclusion, which the court sustained (T. 315).

B. Question to L. A. Bernardi on behalf of appellants:

“Q. Under the Union, do you know what Union claims jurisdiction of that type of work at Clear?”

(Referring to piping and hookup of kitchen equipment)
Objection was made on the ground that the question was irrelevant, which the court sustained (Tr. 315).

Both A and B above, refer to Finding VII (a) and (b), the purpose of the proposed testimony, of course, being to show that this work being plumber’s work, it falls under “all mechanical” scope of the subcontract.

C. Question to F. Murray Haskell on behalf of appellants:

“Q. Would you have been able to keep your men if you had remained on 6 8’s and the others were on 6 9’s?”

to which appellee made the following objection: “If the

court please, objection," which was sustained (T. 530).

D. Question to F. Murray Haskell as follows:

"Q. And what would you state that was a result of the fact that you all went on 6 9's?"

Objected to on the grounds of relevancy which objection was sustained.

The questions under C and D above were for the purpose of showing that with respect to the acceleration claim, Schedule I, Exhibit 29, the appellee did not voluntarily change from 6 days of 8 hours each to 6 days of 9 hours each because of any acceleration, but rather because of pressure brought to bear by the Plumbers' Union on all of the master plumbers in the area and that in the absence of such a change, the master plumbers would not have been able to retain personnel.

SUMMARY OF ARGUMENT

Part One—Acceleration

Findings IX through XVI; (R. 85-90) (Specification of Errors I. E, F, G, H, I, J, K, L, and M; II. B; VII. D, E, F and G; VIII. A, B, C, D, E, F and G; IX C and D) Judgment for \$80,519.24.

Appellant contends that:

(1) There was no acceleration, in fact, and as a consequence there was,

(a) no extra work performed beyond the scope of the subcontract and

- (b) at the special instance and request of appellant, and
- (2) that if any change in the scope of the subcontract was made it was not agreed to in writing between the parties and the appellee is therefore estopped, under the terms of the subcontract, to claim extras, and
- (3) no competent proof was adduced on behalf of appellee to support its claim as to the reasonable value of the extra work, if any.

Part Two—Items of Work

(Finding VII; R. 84-5) (Specification of Errors I. B, C and D)

Appellant contends as to the first three items:

- (1) They were not extra work under the contract,
- (2) Were not agreed to in writing between the parties as provided by the subcontract and the appellee is therefore estopped from claiming extra remuneration, and
- (3) There is no competent evidence as to the reasonable value of the alleged extra work performed.

As to Item 4, Finding VII D, appellant contends, in addition to the above, that this constituted "temporary work" separate and apart from the contract, and accordingly was not before the trial court under the Miller Act.

Part Three—Prior Agreement in Writing as to Extras

(Finding XIV; R. 99) (Specification of Errors I. N)

Appellant contends that the terms of the subcontract in paragraph (e) preclude any recovery by appellee

for any extras, said provision requiring that all claims for extras shall be fully agreed upon in writing prior to the performance of any extra work. Appellee submits that there is no evidence of any waiver of this provision.

Part Four—Interest

(Finding XVIII; R. 99) (Specification of Errors I. M; II. B)

Appellant contends that there is no interest recoverable, the amounts in question being of an unliquidated nature but in any event, having been paid within a reasonable time after completion and acceptance per paragraph (c) of the subcontract.

Part Five—Attorney Fees

(Finding XX; R. 90-1; Conclusion IV) (Specification of Errors I. O and II. D)

Appellant contends that considering the amounts sued for and the amount of recovery, the appellant was the prevailing party and the attorney fees should be offset.

Part Six—Bond Premium, Business Tax, Overhead and Profit

(Findings XV and XVI; R. 88-9) (Specification of Errors I. K)

Appellant contends that there is no proof to support the allowance of bond premium, Alaska Business Tax, overhead and profit; as to the latter two items, particularly where overhead is figured on overhead and profit

is computed on rental of the subcontractor's own small tools and equipment.

Part Seven—Jurisdiction

(Conclusion I; R. 91; Findings VI and VII D; R. 82)
(Specification of Errors I. A and D; II. A)

Appellant contends that the trial court was without jurisdiction, the action having been prematurely commenced and was without ancillary jurisdiction over that portion of the action not coming under the Miller Act.

ARGUMENT

Part One—Acceleration

We will direct the first portion of our argument to the so-called "acceleration" claims of appellee, the erroneous Findings relating thereto being IX, X, XI, XII, XIII, XIV, XV and XVI (R. 85-90). (Specification of Errors I. E, F, G, H, I, J, K, L and M; II B, VII D, VII E, VII F, VII G, VIII A, VIII B, VIII C, VIII D, VIII E, VIII F, VIII G, IX C and IX D). The trial court awarded judgment under these Findings in the amount of \$80,519.24.

It is appellant's position that the above Findings are clearly erroneous, they not being supported by any substantial evidence and the Findings should, therefore, be set aside in their entirety. 28 USC Rule 52(a). There is no conflict in the material evidence respecting this claim, these Findings being the result of the district court permitting the introduction of testimony and exhibits to the prejudice of appellants which evidence was clearly incompetent, for the most part based on hearsay, and the

court's misinterpreting the effect and substance of that evidence.

In order to recover, appellee, of course, must show by competent evidence, *inter alia*, that:

(1) Extra work was performed beyond the scope of the subcontract, and

(2) At the special instance and request of the appellant.

The gravamen of appellee's complaint with respect to this "acceleration" claim is set forth in paragraph X of its supplementary complaint (R. 36) and in paragraphs VIII through XVI of the Findings (R. 85-9). Appellee says, in effect, that because appellant agreed to complete this job one month earlier than it had previously agreed to, there was a change in the scope of the contract requiring extra work. The pertinent dates in this regard are set forth in the Statement of the Case herein. (Pages 4 and 5). We are here particularly concerned with the change in phase completion dates between those set out in Exhibits 27 and 28, formalized in Mod. 6 and the completion dates set out in Mod. 11 (Ex. 26). The effect of the latter was to move the phase completion dates forward by one month.

Did this change of completion dates constitute extra work beyond the scope of the subcontract?

The original completion date under the contract (Ex. O) and hence under the subcontract (Ex. H) was May 31, 1960. When this date could not be met (T. 388, 608)

the Government requested an August 31, 1960 completion (Ex. 38). This not appearing feasible at the time, the phase completion dates of October 15th, November 15th and December 15th were agreed to by Mod. 6. The establishment of these latter dates gave the contractor, as Mr. Bernardi, the project engineer testified, about 30 days cushion on each phase (T. 392, 397-8). Not agreeing to too tight a schedule and providing for some leeway and having a 30-day cushion, particularly in winter work in Alaska, and with \$2,000.00 per day liquidated damages assessable, constituted good construction practice. This was agreed to by both parties' witnesses: Martindale, (T. 64-5); Brewer (T. 129); Bernardi, (T. 397-8) and Baker, (T. 676).

In conformity with its determination that completion could be accomplished at least 30 days before the dates agreed to in Mod. 6, appellant prepared a construction schedule (Ex. I) on April 8, 1960 calling for phase completion dates as follows: First wing, September 15, 1960; Second wing, October 15, 1960; All other, October 15, 1960. The effect of this was to set the first two phases 30 days ahead of that agreed to in Mod. 6 and the last and final phase 60 days ahead. These constituted "target" dates irrespective of the contract schedule (T. 128, 340).

This construction schedule (Ex. I) was posted on the prime contractor's wall (T. 126-128) and was distributed to all of the subcontractors including Urban on April 22, 1960 (T. 338-9, 64, 166). Mr. Martindale and Mr. Brewer, Urban's two representatives at the site, had full

knowledge of Exhibit I from April 22, 1960, never objected to the schedule and agreed that they could meet same (T. 166-7, 64, 72-3). Furthermore, Mr. Martindale was advised by appellant (referring to Ex. I) "if we could make it, fine, and if we couldn't we didn't have to," (T. 72-4). Weekly meetings were held at which time the construction schedule was always a subject of discussion (T. 52-3, 339-40). No one, including appellee, took exception to the dates proposed in Exhibit I (T. 340-1, 73, 167). And, Exhibit I was the only construction schedule governing the progress of the work during the spring, summer and fall of 1960, although the work was finished on November 16th, a month later than that called for in the schedule (T. 74-5). (Actually finished November 20th, Ex. Z). The attempt to meet Exhibit I completion dates was a voluntary undertaking by all concerned.

After Exhibit I was published, the Government made a new direction on April 29, 1960, (Ex. 25), that the first two phases of the job be completed on the same dates as called for by Exhibit I, and the remainder of the work be completed on November 15, 1960, still 30 days after the final completion set forth in Exhibit I. This was not agreed to on April 29, 1960 as stated in Finding IX but was agreed to on June 27, 1960 (Mod. 11, Ex. 26). The effect of Mod. 11 was to change nothing with respect to this contract as the scheduling then stood, except to expose Baker & Ford to substantial liquidated damages in the event of failure to meet Mod. 11 dates. As Mr. Bernardi testified on cross-examination

(T. 408-11, 434), he didn't believe the new schedule (Mod. 11, Ex. 26), would cost any more to perform than the Mod. 6 schedule, a priori it could cost no more to perform than the Exhibit I construction schedule.

Mod. 6 represented good bargaining on the part of the contractor in establishing "outside" dates for completion (T. 392). Exhibit I established practical dates for completion agreed to by all interested persons employed on the job. Mod. 11 (Ex. 26) merely rescinded Mod. 6 and still had a 30-day later completion date than the Exhibit I schedule.

The key inquiry is: Would Urban be heard to claim acceleration if Mod. 6 had established the completion dates ultimately used in Mod. 11? A negative answer is obvious. Thereafter, when Mod. 11 rescinded Mod. 6, establishing completion dates Urban had already agreed to in Exhibit I, how in the name of logic can it claim acceleration? *And particularly so when in fact Urban had no knowledge of any change of completion dates or so-called "acceleration" until February 1961, long after the job was completed.* This was testified to by Mr. Brewer, (T. 110-112, 125-126) and Mr. Urban stated that he did not know about Mod. 11 until long after the meeting at the Washington Athletic Club which was held in February 1961 (T. 274). It is quite obvious that Urban voluntarily chose to comply with the contractor's construction schedule (Ex. I) and absent any knowledge of acceleration until more than two months after completion and absent any objection to the completion dates proposed by the contractor, there is no support in the

evidence for a finding that the voluntary meeting of these completion dates constituted extra work beyond the scope of the contract.

And what of the allegations and Findings that this non-existent acceleration was done at the special instance and request of appellant (R. 36, 87), they reciting that appellant directed and required appellee to "employ more men, work longer hours, pay premium wages," etc. Each of appellee's witnesses was specifically asked whether anyone from Baker & Ford Co. ever directed appellee to employ more men, work longer hours, pay premium wages or accelerate the work during the period in question or to go from 6 8-hour days to 6 9-hour days. In each instance the answer was negative (Martindale, T. 66; Brewer, T. 129-131; Urban, T. 276-7). Neither were there any such directives given to appellee from the Corps of Engineers (T. 276-7). In the absence of any such direction, wherein lies the proof that the extra work, if any, was performed at the special instance and request of the appellant? Particularly when appellee testifies that it did not know of any acceleration until after the job was completed (T. 110-12 125-6, 274).

An additional element for recovery, of course, is that appellee prove by competent evidence the reasonable value of the extra work performed. *Macri and Sons v. U. S.*, 313 F.2d 119, (9th C.A. 1963); *Northern Truck Line v. Dunn*, 167 F.2d 650, (9th C.A. 1948); 11 Alaska 583; *Hill v. Waxberg*, 237 F.2d 936, (9th C.A. 1956); *Central Steel Erection Co. v. Will*, 304 F.2d 548,

(9th C.A. 1962). And, where the subcontract between the parties has a provision, such as in this one,

“(e) To make no claims for extras unless the same shall be fully agreed upon in writing by the CONTRACTOR prior to the performance of any such extra work.”

The law is clear that the,

“Evidence of a waiver of a provision in a building contract requiring a written order for alterations or extras must be clear and convincing.”

9 Am. Jur., *Building and Construction Contracts*, paragraph 141; *O’Keefe v. Corp. of St. Francis Church*, 59 Conn. 551, 22 Atl. 325, 66 A.L.R. 664.

All of appellee’s evidence with respect to quantum for acceleration was proffered by Mr. Urban. The court, over objection, (R. 57; T. 187-234, 261, 278-87, 290-3), admitted into evidence Exhibit 29 (T. 194, 277) and Mr. Urban’s testimony in support thereof under 28 USC 1732a (T. 206-7, 216, 572, 575-6). Appellant contends the evidence was inadmissible as not meeting the requirements of that act. The law is clear the burden of proving that proffered evidence comes within the rule is on the party offering; *Standard Oil Co., of California v. Moore*, 251 F.2d 188, (9th C.A. 1957) and the offering party must lay a proper foundation that the records were made in the regular course of business; *Bisno v. U. S.*, 299 F.2d 711, (9th C.A. 1961) and where summaries are offered, of course, the original records must be identified and available for cross-examination, which they weren’t in this instance

(T. 572); *Daniel v. U. S.*, 343 F.2d 785, (5th C.A. 1965). *Plymouth Village Fire District v. New Amsterdam Casualty Co.*, 130 F. Supp. 798.

As stated in syllabus 2, *Kincaid and King Construction Co., Inc. v. U.S. for use of Olday*, 333 F.2d 561, (9th C.A. 1964),

“Exhibits relating to work performed but not made until after work has been completed and litigation respecting it begun, were not made in regular course of business, nor within reasonable time after event and were not admissible under business records statute.”

With these guide lines in mind and keeping in mind that Mr. Urban was not personally present at the job during the construction period of 1960 which is involved (from May until the end of the job) (T. 260), thereby having no personal knowledge of what additional, if any, was required, let us test the several schedules which go to make up Exhibit 29 to see if they meet the test.

We must also keep in mind the fact that these schedules were made long after the work had been completed and after the litigation was commenced (T. 235-6, 677), that Exhibit 29, being a summary, consisted of an opinion of estimate of Mr. Urban based solely on hearsay, and there not even being proof that the contents thereof were taken from original records. How, in the name of heaven, could appellant, or why should appellant cross-examine on opinion and estimate based on hearsay?

Turning now to the Exhibit itself:

Schedule I. (Finding XVI, R. 88-9)

Mr. Urban stated that he prepared Schedule I, which indicated their increased labor costs from *May 1st until November 15th* which, in his opinion were incurred as the result of working their people 54 hours per week in lieu of 48 hours per week—6 9's as compared to 6 8's—*during that period of time* (T. 188-9).

It is interesting to note that the only four factual entries in that schedule were misrepresentations. The four entries follow:

1. *The amount paid per hour.* The schedule is based on Journeymen receiving \$5.50 per hour. Exhibit Z, being a summary prepared by Peat, Marwick, Mitchell & Company, from the certified payrolls, shows that for the period in question Journeymen received two different rates, to-wit: \$5.25 and \$5.50 per hour. As to Foremen, the schedule uses a \$6.00 per hour figure; Exhibit Z shows that Foremen during the period in question, received \$5.75 part of the time and \$6.00 part of the time. The schedule shows the General Foreman as receiving \$6.50 per hour while Exhibit Z shows that his rate varied from \$6.25 to \$6.50 per hour for the period in question.

2. *Insurance and tax on labor.* Schedule I uses 13 per cent where it is obvious at that time from all of the testimony that 11 per cent was the proper figure (R. 74).

3. *Hours worked.* The schedule together with the testi-

mony of Mr. Urban represents to the court that 6 9's were worked from May 1st until November 15th for a total of 28,819½ hours. This was the grossest of misrepresentations as Urban did not commence working 6 9's until August 7th, 1960, which he well knew (Ex. Z, T. 87). However, Mr. Urban was initially successful in misleading the court in this regard and it was only after objections were filed to the Memorandum of Decision entered by the court that the court determined the schedule and testimony were incorrect and awarded extra compensation for working 6 9's only from August 7, 1960. This constituted a major misrepresentation resulting in 16,212 hours as opposed to the misrepresented 28,819½ hours.

4. *The size of the crew.* Schedule I supported by Mr. Urban's testimony, was based on a crew of 30 men. The fact was as set forth in Exhibit LL, the average crew from May 1st to November 20th was 18.1 men and from August 7th to November 20th, the period during which Urban switched to 6 9's, the average crew was 17.5 men.

The above are factual bases for Schedule I and the testimony in support thereof. In each instance the facts were false as disclosed by the exhibits.

The opinion evidence offered by Mr. Urban and included in Schedule I relates to two items (1) production, (2) indirect labor. We submit that there is absolutely no competent testimony to support Mr. Urban's adoption of the figures used for these two items. He states that he was not present during this portion of the work at Clear and hence would have no personal knowledge

of the production or indirect labor. Neither did he testify that he based this on any information given to him by Mr. Martindale or Mr. Brewer, who were on the site. These figures were merely an estimate or opinion on his part (T. 240-1) arrived at long after the work involved was completed (T. 235-6). They are pure speculation and conjecture. They are not supported by any substantiating or corroborating evidence or by any showing that he had any personal opportunity to observe or know the situation as it existed at Clear or elsewhere under similar circumstances. To the contrary, the testimony of appellant's witnesses, Mr. Bernardi and Mr. Haskell, both of whom were disinterested witnesses, are entitled to great weight. Mr. Haskell, having qualified as an expert (T. 516), stated unequivocally that increasing the number of men from 16 to 19 as estimated by Mr. Brewer (Exs. 8 and 9) would not effect the efficiency of the men in question, and Mr. Bernardi testified that there would be no difference in the ultimate costs by getting the work done before the cold weather set in (T. 408-11), rather than working into November and December, indicating, of course, that the efficiency of the men would be greater during the period in which the job was actually completed as opposed to continuing it on into November and December. *We submit that with reference to the opinion of efficiency, if Mr. Urban had taken into consideration the fact that most of the work was being performed during the summer as opposed to the winter months and given some credit therefor, and had claimed some loss of efficiency pos-*

sibly with respect to the 9th hour alone rather than all nine hours, his opinion testimony might have been entitled to some consideration. We further point out that there is an absolute dirth of substantiation for the indirect labor item, which the court allowed, which purportedly relates to home office costs. *What explanation is there in the record as to how that could be increased in any such amount by increasing the hours worked from 8 to 9?*

There is yet another mixed factual and opinion item included in Schedule I which the evidence does not support by anything close to a preponderance. That is the representation inherent in that schedule that appellee went to 6 9's instead of 6 8's as the result of some directive from Baker & Ford or because of the stepped up dates provided for in Mod. 11. Four logical inferences completely rebut the assumption which appellee asked the court to draw:

(1) By all of appellee's testimony it had scheduled its work and commenced to perform its work under appellant's construction schedule (Ex. I) which was issued in April before Mod. 11 was ever considered.

(2) Appellee, per the testimony of Mr. Urban and Mr. Brewer, had no knowledge of the existence of Mod. 11 until February 1961, several months after the job was completed.

(3) By all of the testimony, including all of the appellee's witnesses, no directives were ever issued by Baker & Ford Co. or the Corps of Engineers to appellee to in-

crease the number of hours being worked, or increase the number of men, etc.

(4) Appellee did not go to 6 9's because of any acceleration; it went to 6 9's because it was forced to by the Plumber's Union.

An analysis of the testimony on this latter point we believe would be helpful: Mr. Urban testified that they went to 6 9's on May 1st and continued on that schedule until the completion of the job because of an acceleration order given by Baker & Ford. This is patently erroneous as the court later discovered from an analysis of the time sheets, Urban not going on 6 9's until August 7th, they working on 6 8's prior thereto. Further, all of appellee's witnesses testified that Baker & Ford Co. never directed them to accelerate, work longer hours, etc.

The fact is as disclosed by all of the testimony that there had been a work stoppage in the Fairbanks area in the latter part of July, 1960 (T. 132-3, 523). The Plumber's Union, in an effort to increase the hours worked on the part of their members, refused to dispatch foremen to the various jobs and the previously employed foremen would not work (T. 133-6, 528). Without foremen, the journeymen would not work (T. 136). This was not a strike in the true sense but its effect was the same, the result being a work stoppage so far as plumbers and steamfitters were concerned. As a result, numerous meetings were held at the Traveler's Inn in Fairbanks between the master plumbers and between the master plumbers and the Union during the

first week in August (T. 136, 524). On or about the 6th or 7th of August, all of the master plumbers in the Fairbanks area yielded to the demands of the Union and commenced working 6 9-hour days (T. 137, 529-30) instead of 6 8-hour days which had been the pattern for the year 1960 (T. 523, 131). As Mr. Brewer said, all of the mechanical subcontractors in the area increased their hours about this time because of lack of manpower (T. 137), which is another way to say that the increase was necessitated because of the plumber's walk-out—he did not state that the increase was occasioned by any acceleration or directive. Mr. Martindale was asked why appellee went on 6 9's and he affirmed it "was because all of the other plumbers in the area did" (T. 89). It is obvious that this was the only reason and it is obvious that it was not because of any acceleration.

To further refute the position of appellee in this regard, we call the court's attention to the fact that appellee continued on 6 9's until the completion of the job even when in the latter stages its work force was reduced to a fraction of its peak (Ex. Z).

In passing this point we should like to point out that the Haskell Corporation, of which Mr. Haskell is the president, by all of the testimony was the largest single master plumber at Clear and they were not on any accelerated schedule but were forced to go to 6 9's the fore part of August as were all the others (T. 529-30).

It is interesting to note that no attempt was made to have Mr. Brewer or Mr. Martindale, in their testimony,

substantiate or corroborate Schedule I. Mr. Brewer merely stated that Schedule I was prepared by Mr. Urban. Apparently, he wanted to go no further. Mr. Brewer could hardly have gone any further in his testimony as his corrected proposals (Exs. 8 and 9) do not support Schedule I.

As we will show, these proposals were based on what was a fair and reasoned analysis by the resident superintendent, Mr. Brewer, subject to correction for the mathematical errors contained in them. The basic error in computation was in arriving at 495 additional projected man days instead of 95 additional projected man days for the November completion. This was reasonably close, as the evidence, as outlined hereinafter, will show that the actual additional man days for the November 20th completion over and above the projected man days for December 15th completion was, in fact, 37

The error in Mr. Brewer's computation of 400 man days was pointed out to him on cross-examination (T. 149-156) and in the examination of Mr. Bernardi (T. 347-8). Exhibits 8 and 9 were based on the premise that 16 man units would be required for 190 work days if the job were to run from May 1st to December 15th. 190 days times 16 man units per day equals 3040 man days. The exhibits were also based on the premise that 19 man units would be required for 165 work days if the job were to run from May 1st to November 15th. 165 days times 19 man units per day equals 3135 man days. The differential in the man days as projected in said exhibits between the November 15th completion

and December 15th completion would be 3135 minus 3040 man days or *95 additional man days*.

Mr. Brewer, on these exhibits, increased the 165 man days by 3 man units coming out with a product of 495 man days. He neglected to reduce this number by the 400 man days that were eliminated as the result of 16 men working 25 days less, i.e. 165 work days instead of 190 work days. This differential of 95 man days based on an 8-hour day would represent 760 additional hours. Even using the unit price of \$8.10 shown on Exhibit 9, this resulted in projected increased costs to the appellee of only \$6,156.00, a far cry from the \$30,389.40 allowed under Schedule I. And it is interesting to note that the \$8.10 is based on journeymen's wages of \$5.65 per hour when in fact they ran from \$5.25 per hour to \$5.50 per hour (Ex. Z) and it is further based on an inefficiency factor of 15 per cent. Mr. Brewer used this same inefficiency factor on both Exhibits 8 and 9, one dealing with 8-hour days and the other dealing with 9-hour days which would indicate that in his opinion there is no greater inefficiency with respect to working 6 8's than 6 9's, this being diametrically opposed to the testimony of Mr. Urban.

Exhibits 8 and 9, notwithstanding the erroneous base wages used for journeymen, clearly indicate that based on a 19 man crew from May 1st to completion, appellee's own labor costs might be increased then approximately \$6,000.00 irrespective of insurance and tax on labor. This flies directly in the face of the figure proposed in Schedule I by Mr. Urban.

Since, however, the job has been completed, it is not necessary to project the additional man days actually required. This information is available to us. Exhibit LL, which is a summary of the Peat, Marwick & Mitchell Co. recapitulation (Ex. Z) of the certified payrolls, shows that the average man units from May 1st to November 20th, the actual date of completion, was 18.1 men. The actual working days from May 1st to November 20th would be 170 which times 18.1 would give a product of total actual man days from May 1st to November 20th of 3077.

The differential then in man days for projected December 15th completion (3040) as compared to the actual additional man days used for November 20th completion (3077) is only 37 additional man days. This is not an estimate, it is a fact.

Thirty-seven additional man days based on the representative 8-hour day employed by Mr. Brewer would represent 296 hours. Using the \$8.10 figure employed by Mr. Brewer on Exhibit 9 and multiplying that times the additional 296 hours would leave a total cost differential of \$2397.60 exclusive of insurance and tax on labor.

Summarizing as to Schedule I, we submit in view of the gross misrepresentations as to every substantive factual entry thereon and the testimony supporting it and the complete failure on the part of appellee to corroborate or substantiate the opinion entries on Schedule I and the testimony supporting it relating to production

factor and the indirect labor as well as the reason for working 6 9's, the testimony of Mr. Urban with respect to this schedule and the schedule itself should be disregarded in their entirety. The schedule and testimony in support thereof were obviously designed to mislead and the opinion evidence on the part of Mr. Urban being speculative and conjectural and not based on any personal knowledge on his part, does not rise to the level required to sustain appellee's burden of proof.

Neither did Mr. Urban testify that the costs claimed under this particular schedule were actually incurred or that they were reasonable. And if he had, not having any personal knowledge and based on the factual misrepresentations in that schedule, that testimony would not have been worthy of consideration.

Checklist; (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule II. (Finding XVI, R. 88-9).

The court allowed recovery for the first three items set forth on this schedule and declined recovery on the last item.

The first allowed item is \$1361.72 being *small tool expense* figured, as Mr. Urban testified, at 2½ per cent of the claimed increased payroll (T. 198-9). This award is patently erroneous as the 2½ per cent is figured on \$54,468.86 which was the sum claimed as additional payroll in Schedule I. The court cut this amount down to \$30,389.40 (R. 89) but awarded 2½ per cent of the

claimed \$54,468.86. Mr. Urban, the only person testifying as to small tool expense, stated that this 2½ per cent was a figure his company used in their business (T. 198). There was no substantiation of this fact or any testimony to the effect that this was a reasonable amount or that these costs were incurred. This item is not based on new tools for additional plumbers but is based on the same tools for the same plumbers working the ninth hour. This would not increase their costs for small tools at all, in fact, it would reduce the cost as compared to hiring additional plumbers in lieu of the regular plumbers working the ninth hour.

Rental of four portable gas welding machines. Hearsay (T. 247). No testimony was given as to what period any machines were rented other than the "3½ months" unsupported recitation on the schedule. Mr. Brewer testified that *two* welding machines were rented sometime during July, August and September—not four (T. 116). He did not testify as to the length of rental time during those months nor did he give any testimony as to rental paid or what constituted a reasonable rental. Neither did Mr. Urban give any testimony as to the reasonable rental (T. 199, 247).

The next item of allowance in Schedule II was for rent of one *6-passenger pickup truck, 5½ months times \$225.00*. We call the court's attention to Exhibit N wherein Mr. Brewer urgently requested additional transportation because of the condition of the equipment he then had at the site. The memo will show that the sole reason for the pickup was because of the poor equipment

at the site and not because of any increased demands, and further shows that this transaction was between Mr. Brewer and Mr. Urban, Sr., deceased. It is true that Mr. Fred Urban testified that the pickup was required because of increased manpower, even though he had no personal knowledge. There is no support for this assertion either in Exhibit N or in the payroll sheets.

Further, there is absolutely no showing whatsoever as to what the reasonable value of such a rental would be (T. 201). This pickup was not rented, it was purchased by Urban. Mr. Urban testified that he did not know the rental charges of Volkswagen pickups in the Fairbanks area (T. 249). This testimony is not sufficient to establish reasonable rental.

In addition, these are all overhead items; nonetheless the court allowed 15% overhead on these overhead items and, in addition, allowed 10% profit on rental of appellee's own equipment directly contrary to this court's holding in *Central Steel Erection Co. v. Will*, supra.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule IV. (Finding XVI, R. 88-9.)

Additional special shipment costs, \$3,043.31.

The court allowed the first three items of Schedule IV. Mr. Urban gave the only testimony with respect to this schedule. He advised that on the first three items the figures were partially prepared by him and partially prepared by a Mr. Way (T. 207). He further testified that

Mr. Way gave him certain invoices which, Mr. Way said, were incurred as a result of acceleration and Mr. Urban merely recapped them (T. 208).

There was no substantiation of this hearsay testimony either by original invoices, which are the best evidence, which appellants requested be produced, (T. 205-7, 251-4) nor was there any substantiation by Mr. Way, who was appellee's office manager or by Mr. Brewer or Mr. Martindale who may have had some knowledge concerning the entries included on that exhibit. Again, these were overhead items on which the court allowed an additional 15% overhead and 10% profit, (Finding XVI, R. 88-9) contrary to this court's holding in *Central Steel Erection Co. v. Will*, supra.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule V. (Finding XVI, R. 88-9).

Increased cost of subcontractors—\$4,452.48.

With respect to this schedule the court awarded the Read Sheet Metal Company item, not as set forth, but in the sum of \$4,452.48. First of all, we should like to point out that appellee, in this schedule, grossly misrepresented the Read Sheet Metal Company estimate of additional costs, it being itemized at \$5,797.20 whereas, in fact, per Read's letter of August 7th, 1962, the amount was \$3,854.96. Mr. Urban once again prepared this schedule. He testified he obtained Read's figure from Mr. Brewer—hearsay once more (T. 255). Exhibit 17, being Mr. Read's proposal, was admitted in evidence over ob-

jection (T. 79). The important part of Mr. Read's testimony is that his proposal (Ex. 17) to Mr. Brewer was made on the premise that he would have to complete his work by the 15th of September, 1960 (T. 78, 83-5). He actually completed everything on September 19, 1960 (T. 83), thereby indicating that he was shooting for a September 15th target, and he didn't overrun his original man day estimate (T. 80). Mr. Read very candidly then went on to say with respect to scheduling his work and increased costs that it would have made a great difference if he had known that he actually had until October 15th, 1960, in which event there would have been no additional costs (T. 85).

There is absolutely no testimony whatsoever by anyone to the effect that Read Sheet Metal sustained any increased costs based on October 15th completion, or any completion date, or the reasonable value of any such costs.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule VI. (Finding XVI, R. 88-9).

Labor doubletime cost—\$5,833.50.

This schedule and the testimony in support thereof are subject to the same shortcomings of proof as the previous schedules. The only testimony supporting this schedule was given by Mr. Urban (T. 212-14). He merely testified that the doubletime hours were given to him by Mr. John Way, his office manager (T. 212, 257), and that

the hours shown on this schedule represented doubletime worked over and above that called for in a 54-hour week. He went no further. How can this bare testimony establish this item as having been incurred as a consequence of acceleration or establish the reasonable value? Mr. Brewer and Mr. Martindale, who were present in court and were the only witnesses we know of who were competent to testify in support of this schedule, were not examined concerning it. It is interesting to note, however, that Mr. Martindale did testify there was very little doubletime — two or three times only (T. 68), without attempting to attribute it to “acceleration.”

Furthermore, this is a duplication of the hours already included in Schedule I for which the trial court allowed “increased labor costs” of \$30,389.40 in Finding XVI (R. 89). The total hours of all types—straight time, time and a half and doubletime, (shown as O.T.) taken from the payrolls (Ex. Z.) and summarized on Exhibit LL, from August 7th through November 20th, 1960, were 16,212. This was called to the court’s attention in appellant’s objections to Memorandum of Decision (R. 78) whereafter the court revised its Memorandum of Decision to allow only for that number of hours instead of 28,819½ running from May 1st through November 20th. The court used a factor of increased labor costs of \$1.8745 per hour, it having reduced the insurance and tax on labor from 13% to 11% (which, multiplied by 16,212 hours, gives a product of \$30,389.40). An analysis of Exhibits Z and LL will show that *all* doubletime hours from May 1 to November 20 were already included and the doubletime

hours referred to in Schedule VI are a duplication.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Schedule VII. (Finding XVI, R. 88-9).

Mobilizing and transportation of additional plumbers—\$2,499.12.

Mr. Urban once again was the only witness testifying in support of this schedule. He stated that he prepared the costs (T. 214) he did not indicate from what source or invoices these costs were prepared, if any. He stated that he determined from Mr. Brewer his estimate of the number of additional men engaged and that the 50% turnover item in the sum of \$833.04 he doesn't know about, that was just an estimate (T. 214-15). So, here again, we have an estimate with no personal knowledge (T. 260) based on hearsay. As to this schedule, the court should have exercised its own judgment and determined that a plane trip of approximately 60 miles from Fairbanks to Clear being approximately a one-half hour ride could not result in the incurring of any additional subsistence or travel pay in excess of approximately one hour which would be approximately 1/10 of the claimed travel pay. And where is there any evidence supporting the subsistence claim for which recovery was allowed?

This schedule actually infers that 18 plus 9 or 27 additional men were required at Clear, notwithstanding Mr. Brewer's estimate that 3 additional men would be required (Exs. 8 and 9) or assuming a 50% turnover, $4\frac{1}{2}$

additional men. Once again, Mr. Brewer and Mr. Martindale were the only competent witnesses to the contents of Schedule VII. They were not examined with respect to it.

Checklists (1) Extra work—NO; (3) Appellant's request — NO; and (3) Reasonable value — NO.

Schedule VIII. (Finding XVI, R. 88-9).

Increased camp subsistence cost—\$12,600.00.

Under this schedule appellee claimed the amount stated. Mr. Urban on direct examination testified that this schedule was prepared by Mr. Way and consisted of an estimation by Mr. Way (T. 215-16). This is hearsay compounded by conjecture. On cross-examination he testified that he had no knowledge of its contents that he did not prepare the schedule (T. 261). Neither did Mr. Brewer nor Mr. Martindale give any testimony with respect to it. There is no evidence whatsoever in support of it.

The court, over objection (T. 216) permitted evidence on this item under the "Federal Shop Book Rule" as coming from the "records of the company." There was no foundation laid by appellee to support this ruling. It is quite obvious that the court, with respect to all of these schedules, was laboring under some misapprehension as to the source of the information being summarized. While this record is replete with glaring errors, there is no more obvious one than in permitting recovery on this schedule. The only two references to it in the entire record appear on pages 215-16 and 261.

It is interesting to note that the court in its Memorandum of Decision (R. 71-6) reduced this amount to \$7,356.00 and in Paragraph 11 thereof, set forth the basis of its computation. The court therein explained that this was computed by reference to Exhibit 9 which reflects a total of 558 man camp days. The 558 man camp days in Exhibit 9 included 495 days for Urban. We believe we have shown with clarity under the discussion relating to acceleration, pages 36 through 38, that the actual additional man days for Urban were 37. Also included in the 558 days is 30 man days for Read Sheet Metal. Reference to Exhibit 17 shows that 30 man camp days were included in Read's billing to Urban and were already allowed by the court in the total amount set forth under Schedule V. In addition the 33 man days for Fiberglass appearing on Exhibit 9 going to make up the 558 days figure should not be allowed as the Fiberglass Insulation Company claim under Schedule V was disallowed. With reference to the 48 man camp days for connecting kitchen equipment and 7 man camp days for connecting water and drains to refrigeration equipment referred to in the memorandum decision, these are merely items set forth on certain of appellee's exhibits with absolutely no substantiation or testimony as to what additional time was required.

The court in its Memorandum Decision allowed 613 man days as set forth in Paragraph 11 or a total of \$7,356.00. Thereafter in some fashion or another, this was erroneously increased to \$12,600.00 in the Findings

and Judgment. There was no evidence to support either amount.

Checklist: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

We submit with respect to all of Exhibit 29 insofar as Mr. Urban's testimony is concerned, there was a complete lack of *KNOWLEDGE* on his part of the facts relating to cost or reasonable value, or what transpired, and on this complete lack of knowledge or personal observation he impounded his personal opinion. If this is not speculation and conjecture, what is the meaning of these words? His expressions of opinion and his computations in Exhibit 29 were based in part on hearsay evidence received from Mr. Way (and Mr. Way was not present in court) in part on hearsay from Mr. Brewer, and in part on guesswork of his own not even based on hearsay. Presumably if the basic facts supporting Exhibit 29 had been developed through witnesses having a personal knowledge such as Mr. Brewer or Mr. Martindale, Mr. Urban could have given his opinion as to reasonable values based on hypothetical questions, if he had qualified as an expert. This, of course, was not attempted. Having no personal knowledge of the facts through personal observation or otherwise, Mr. Urban was not competent to state an opinion as to costs or reasonable values and the court erred in receiving or considering his testimony with respect to all of Exhibit 29; as well as the exhibit itself.

Wigmore 3rd Edition treats with this subject and

clearly Mr. Urban's testimony should not have been received under the following pertinent portions of Wigmore.

"§ 657(a). The first corollary from the general principle of knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others—in other words, must be founded on personal observation and this general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental."

"658(b) (3). 'Belief' or 'impression' may signify a *lack of actual personal observation*; when this is the case the main principle (lack of knowledge) excludes such testimony."

"What the courts repudiate then is a mere guess, an exercise of the imagination, suspicion, and conjecture offered in place of the result of actual personal observation; it is from this point of view only that a 'belief,' 'opinion' or 'impression' is not to be received."

And it is equally clear that as a condition precedent to testifying as to value it must be shown that the witness has a knowledge of value in the vicinity in question. I Wigmore 3rd Edition 718, *U.S. v. Jones*, 176 F.2d 278 (9th C.A. 1949).

Absent any competent evidence which we believe has been demonstrated,

"It is elementary that compensatory damages can not be allowed unless there is satisfactory evidence to support them . . . the law requires the production of the best evidence available." *KOWTKO v. Delaware*, 131 F. Supp. 95.

"The claimant bears the burden of proving the fact of loss with certainty, as well as the burden of prov-

ing the amount of loss with sufficient certainty so that determination of the amount of damages will be more than mere speculation." *Willems Industries Inc. v. U.S.*, 295 F.2d 822 (1961), U.S. Ct. of Claims.

In *Scholes Inc. v. U.S. for the use of H.W. Moore Equipment Company*, 295 F.2d 366, (10th C.A. 1961) while the court held that the evidence was sufficient to make a fair and reasonable approximation, it further stated unequivocally that "recovery of monetary reparation cannot be predicated upon speculation and conjecture."

In *Hoffer Oil Corp. v. Carpenter*, 34 F.2d 589, (10th C.A. 1929) the court held damages must be proved through the opinions of well-informed persons, bearing out the rule expounded by Wigmore.

In *Plymouth Village Fire District v. New Amsterdam Casualty Company*, *supra*, testimony with respect to damages was based on records admitted into evidence made by others than the witness, which the court rejected. The court stated:

"The greater portion of data from which these records were compiled was furnished to the engineers by the substitute contractor and in no instance were its contemporaneous daily records before the court. Opportunity to examine these and to determine their veracity and accuracy was not available to counsel. In this connection, there was lacking in evidence the quantum and locale of the work allegedly done."

Appellee succeeded in influencing the trial judge in believing that appellant had received some substantial windfalls with respect to changes in the subject contract as well as changes in Contract 1282, which was a com-

plete and separate contract in which appellee was not involved (T. 607-8) (Finding XI; R. 85-6) (T. 532). It accordingly admitted into evidence Exhibits 34, (T. 300) 35 (T. 300) and 41 (T. 404) (Specification of Errors VII E, F and G) and testimony of Mr. Haskell (T. 532-3) (Specification of Errors VII F) all over objection. The court, in Finding IX (T. 85-6) went on to specifically find that part of the camp "maintenance" required for Contract 1302 was included in Contract 1282 (Specification of Errors I. E). Reference to these exhibits will clearly show that they merely included allowance for camp facilities, to-wit: housing and mess hall, no maintenance or feeding.

The uncontroverted evidence as given by Mr. Bernardi (T. 450-7, 499) and Mr. Baker (T. 623-31) was that there were no additional costs involved in setting up the date for Contract 1302, that there were substantial additional costs with reference to changes in 1282, including additional housing, messing, liability for fire (T. 625-6) and that the distribution of the available funds by the Corps of Engineers between Contracts 1302 and 1282 was done *ex parte* and arbitrarily.

Baker & Ford did not request any additional funds with respect to either contract for subcontractors for acceleration, which a reference to Exhibit 33 will confirm. As pointed out by appellee's witnesses, the acceleration items were actually allowance for the major fire on Contract 1282, under a different name (T. 453-7, 625-6).

No other subcontractor on either of these contracts

submitted a claim for acceleration costs, nor was any other subcontractor paid therefor. This is certainly indicative of the fact that there was no acceleration (T. 485).

Also worthy of note in this regard, although it certainly is irrelevant, is that under Mod. 6 the Government arbitrarily awarded Baker & Ford \$146,276.00 for setting the previous dates up by one month and, in addition required abandonment of warehouse B, erection of a new warehouse and subsequent demolition thereof (Ex. 25, 26), the costs not being segregated. For all the record indicates, this entire amount could be for the warehouse itself. However, for purposes of argument, we will assume that the entire sum was in consideration of the stepped up dates. This would represent 4% of the prime contract which was for the amount of \$3,666,499.00. 4% of the principal amount of appellee's subcontract, which was for a total of \$669,500.00, would be \$26,780.00. Under the present judgment, the court proposes to award appellee \$80,519.24, leaving only \$65,756.00 to the prime contractor for its so-called acceleration costs, including all of the warehouse work. The absurd result is, that the subcontractor receives an amount equal to 12% of its contract and the general contractor is left with an amount equal to .018% of its contract.

Irrespective of the foregoing, we submit that where the general contractor did not specifically make any claim and recover any amount for the subcontractor, the amount the prime contractor received has no bearing whatsoever on what the subcontractor is entitled to, and the considera-

tion of the exhibits and testimony in this regard by the trial court was error.

Appellee, subcontractor, is entitled to the reasonable value of its work and material if a substantial change has been ordered.

What, if any, compensation was paid to the prime contractor for the changes in question can have no bearing on the amount to which the subcontractor is entitled should be obvious for the following reasons: (1) Appellee was not a party to the original contract and its rights arise solely out of its subcontract with appellant, (2) the provisions for price adjustments and the undertakings of the parties in the original contract on the one hand and the subcontract on the other are quite different, (3) the considerations involved in the settlement between the prime contractor and the government, and the prime contractor and the subcontractor are quite different, and (4) the rule of law above stated, which is quite clear, that irrespective of any other considerations as between these parties, the party performing, in this instance the appellee, is entitled to the reasonable value of its service based on the reasonable cost of the materials furnished, labor performed and a reasonable allowance for profit.

This is illustrated in the case of *Adam J. Lanehart v. United Enterprise, Inc.*, 226 F.2d 359. It is an action by a sub against a general contractor involving a government contract. The government and the prime contractor entered into a supplemental agreement deleting certain work. The prime contractor and the government then

substituted other work in place of the deleted work. The sub contends that because the prime contractor eventually received funds included in the contract for the deleted work that those funds should in turn be passed on to him. The court in answer to this contention stated that the mere fact that United Enterprise, Inc., the prime contractor, ultimately received all or part of the funds does not entitle the subcontractor to them. And as pointed out in *U. S. v. Hensler*, 125 F. Supp. 887 (1954) the fact that the prime contractor settled with the government for a lesser sum than the subcontractor was entitled to would not be binding on the subcontractor.

Part Two—Items of Work.

Turning now to Finding VII (R. 84-5) (Specification of Errors I. B, C & D) the court permitted recovery for four specific claims.

With respect to these items there is no dispute in the evidence. We will accordingly treat with the evidence as to the items contained in this Finding in the light most favorable to appellee.

Finding VII(a). *Connection kitchen equipment* — \$3,722.43 (R. 84) (Specification of Errors I. B, II B, VII C, IX A, IX B). The only direct testimony on this item was given by Mr. Martindale, appellee's foreman. He stated that Mr. Ference, one of appellant's superintendents, directed him to do the work but that Mr. Ference did not agree to pay any additional amount therefor (T. 39, 62, 63). He further stated (T. 62) along with Mr. Haskell, the only impartial expert witness testifying (T.

536-540) that this work fell within the jurisdiction of the plumbers and Mr. Haskell testified that as a master plumber of extensive experience, the undertaking to do "all mechanical" in a subcontract such as this one (Ex. H) means all work falling within the jurisdiction of the United Association of Plumbers and Steamfitters; (also Mr. Urban (T. 289) and Mr. Baker (T. 604-605)) therefore, it was not extra work (T. 536-540). There was no testimony whatsoever regarding the reasonableness of the value of the work. Plaintiff's Exhibit 21 (invoice) was admitted (T. 39) over objection (R. 57) as no proper foundation, (Specification of Errors VII. C), and no identification whatsoever was made thereof nor was there any substantiation of its contents or showing by whom or from what source it was prepared. The only testimony relating to value was given by appellee's superintendent, Brewer, who stated that "to the best of my knowledge" this exhibit represented the additional cost (T. 94-95). There is no showing that Mr. Brewer had any knowledge of the costs or what was done or that he even saw the work, he stating that he merely had Mr. Martindale keep a separate breakdown.

Check-list: (1) Extra work—NO; (2) Appellant's request—YES; and (3) Reasonable value—NO.

Finding VII(b). *Connecting water lines and drains to refrigeration equipment*—\$503.78 (R. 84, 85) (Specification of Errors I B, II B, VII B, IX A, IX B). The testimony, or lack of it, is identical with that set forth with respect to Finding VII(a) above. Mr. Martindale, appel-

lee's foreman, gave the only testimony directly bearing on this item stating that appellant's superintendent, Ference, instructed him to do the work (T. 41) and that there was no agreement to pay for it (T. 62). Once again, Mr. Martindale (T. 62) and Mr. Haskell (T. 536-540) stated that this is plumber's work and Mr. Haskell testified that in his interpretation and in the practice of the trade, "a subcontract calling for 'all mechanical' (Ex. H) includes all work falling within the jurisdiction of the United Association of Plumbers and Steamfitters" (T. 536-540) (also Mr. Urban (T. 289) and Mr. Baker (T. 604-605)).

Plaintiffs' Exhibit 19 (Invoice) (Specification of Errors VII. B) was admitted (T. 41) over objection (R. 57) but was not in any way identified or substantiated at the trial excepting by Mr. Brewer and it is apparent from his testimony that he had no personal knowledge of the entries contained on the exhibits (T. 94, 95). Neither was any valid testimony given with respect to the reasonable value of this item (T. 40-42).

Check-list: (1) Extra work—NO; (2) Appellant's request—YES; and (3) Reasonable value—NO.

Finding VII(c). *Installing grease interceptor extensions*—\$2,559.00 (R. 85) (Specification of Errors I. C, II. B). Mr. Martindale for appellee, once again gave the only testimony bearing directly on this item (other than testimony of Mr. Brewer and Mr. McGonigal, appellant's office manager, directed solely to whether it was performed and the necessity thereof). Mr. Martindale stated that

he had no discussions with any of appellant's representatives regarding this installation, it was not done at their request, but pursuant to instructions received from Urban's Portland office (T. 45). There was no testimony whatsoever regarding the time or materials used or the value thereof or that this work was ordered by appellant. The only reference in the trial record in this regard is the statement by Mr. Martindale that he kept a record and turned it into his employers (T. 45). No such record was ever offered. Once again, this work would be required under "all mechanical" it being plumber's work. (T. 536-540; 289; 604-605).

Check-list: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Finding VII(d). *Repairing water main leaks*—\$2,586.00 (R. 85) (Specification of Errors I. D, II. A, II. C, VII. A, VIII. A). Per plaintiff's Exhibit 3 (letter from appellee to appellant) admitted (T. 60) over objection (R. 55) referring to the alleged repair of three water main leaks. This letter, with respect to its source or disposition, was never identified by anyone.

Mr. Martindale stated that Mr. Huntington of Baker & Ford, instructed him to fix "the first one (leak) that occurred" (T. 43). There is no testimony that anyone else instructed appellee to fix any additional leaks. Mr. Brewer, for Urban, testified that he was present at the repair of one break (T. 99). There was no substantiation of the materials or labor used on the one leak authorized, let alone three leaks referred to in the exhibit. At

lee's foreman, gave the only testimony directly bearing on this item stating that appellant's superintendent, Ference, instructed him to do the work (T. 41) and that there was no agreement to pay for it (T. 62). Once again, Mr. Martindale (T. 62) and Mr. Haskell (T. 536-540) stated that this is plumber's work and Mr. Haskell testified that in his interpretation and in the practice of the trade, "a subcontract calling for 'all mechanical' (Ex. H) includes all work falling within the jurisdiction of the United Association of Plumbers and Steamfitters" (T. 536-540) (also Mr. Urban (T. 289) and Mr. Baker (T. 604-605)).

Plaintiffs' Exhibit 19 (Invoice) (Specification of Errors VII. B) was admitted (T. 41) over objection (R. 57) but was not in any way identified or substantiated at the trial excepting by Mr. Brewer and it is apparent from his testimony that he had no personal knowledge of the entries contained on the exhibits (T. 94, 95). Neither was any valid testimony given with respect to the reasonable value of this item (T. 40-42).

Check-list: (1) Extra work—NO; (2) Appellant's request—YES; and (3) Reasonable value—NO.

Finding VII(c). *Installing grease interceptor extensions*—\$2,559.00 (R. 85) (Specification of Errors I. C, II. B). Mr. Martindale for appellee, once again gave the only testimony bearing directly on this item (other than testimony of Mr. Brewer and Mr. McGonigal, appellant's office manager, directed solely to whether it was performed and the necessity thereof). Mr. Martindale stated that

he had no discussions with any of appellant's representatives regarding this installation, it was not done at their request, but pursuant to instructions received from Urban's Portland office (T. 45). There was no testimony whatsoever regarding the time or materials used or the value thereof or that this work was ordered by appellant. The only reference in the trial record in this regard is the statement by Mr. Martindale that he kept a record and turned it into his employers (T. 45). No such record was ever offered. Once again, this work would be required under "all mechanical" it being plumber's work. (T. 536-540; 289; 604-605).

Check-list: (1) Extra work—NO; (2) Appellant's request—NO; and (3) Reasonable value—NO.

Finding VII(d). *Repairing water main leaks*—\$2,586.00 (R. 85) (Specification of Errors I. D, II. A, II. C, VII. A, VIII. A). Per plaintiff's Exhibit 3 (letter from appellee to appellant) admitted (T. 60) over objection (R. 55) referring to the alleged repair of three water main leaks. This letter, with respect to its source or disposition, was never identified by anyone.

Mr. Martindale stated that Mr. Huntington of Baker & Ford, instructed him to fix "the first one (leak) that occurred" (T. 43). There is no testimony that anyone else instructed appellee to fix any additional leaks. Mr. Brewer, for Urban, testified that he was present at the repair of one break (T. 99). There was no substantiation of the materials or labor used on the one leak authorized, let alone three leaks referred to in the exhibit. At

most, Mr. Martindale testified that the breakdown on the exhibit fairly represented the "labor and material that went into the repair of the water line in 1959" (T. 60), or that the amount was a reasonable charge "over the period of fixing the water lines" (T. 43). But, it is quite apparent that Mr. Martindale was referring to the full period of 1959 and possibly 1960 with no reference to the number of leaks involved. Mr. Brewer's testimony, over objection (Specification of Errors VIII. A) that the amount was fair and reasonable should not have been admitted and was nothing more than a voluntary conclusion as he had, according to his testimony, only knowledge of the repair of one break (T. 99, 100, 101, 121). It is interesting to note that Mr. Martindale stated that the sum is a fair figure for repairs for 1959 in connection with Mr. Brewer's testimony that there were, in addition to the one break authorized by Baker & Ford, thirteen to fifteen breaks just prior to Baker & Ford taking over (T. 98, 101).

There is no showing on the part of appellee that the repair of these water line breaks was in connection with Contract 1302 (T. 648-9) and the court so found, the court only having gained jurisdiction of this controversy under the Miller Act because the work was performed in its district. There is no basis in law for the court claiming ancillary jurisdiction as to this item.

Check-list (1) Extra work — NO, at best only one leak repair and this certainly not under contract 1302; and (2) Appellant's request—only to the extent of one leak

repair; and (3) Reasonable value—NO; the testimony respecting such certainly not rising to the required level of proof.

With respect to Findings VII (a), (b) and (c) discussed above, under a subcontract such as this where the appellee agrees to do “all mechanical work for a complete installation,” inherent in construction work is the subcontractor’s responsibility to “furnish a complete installation ready for operation.” The specifications (Ex. II) Section 31.03, paragraphs D and E and Section 31-33, respecting the grease interceptors, specifically impose this duty. This interpretation is substantiated in the following recent case: *Unicon Management Corp.*, 65-1 BCA, para. 4827. That case before the Veteran’s Administration Contract Appeals Board, No. 463, decided April 26, 1965, holding:

“Even though drawings did not provide for steam service connections for steam-operated kitchen equipment, a contractor was required to provide such service lines under the contract because the specifications, which required that ‘equipment furnished . . . shall be installed complete, . . . ready for operation,’ warned that some of the necessary work might not be described in the contract documents but left to the initiative and responsibility of the contractor.”

Part Three—Prior Agreement in Writing as to Extras.

This has reference to Finding XIV (R. 99) (Specification of Errors I. N) respecting the clause in the subcontract (Ex. H(e)) to the effect that no claims for extras shall be made unless fully agreed upon in writing prior to the performance of any such extra work. Find-

ing XVI asserts that "Baker & Ford Company waived the provisions of the subcontract requiring notice and written directions and agreement as to extras by verbally directing the same . . ." In each instance where appellee's three witnesses were examined in this regard, they testified that no verbal directions were given. (Martindale, T. 66; Brewer, T. 129-31; Urban, T. 276-7). In fact, Mr. Martindale testified that even if Baker & Ford Company had attempted to tell him how to conduct his operations he wouldn't "listen to them anyway"—that was between him and Mr. Brewer (T. 65). The only verbal directions testified to in the record are for "extra work" such as trailer camp and barracks (T. 58-9) which were not a part of Contract 1302 (T. 118-20), and some insulation work in the attic which was a part of 1302 (T. 97), but which was not ordered and performed until December of 1960, after the basic contract work was completed and turned over to the Government (T. 121).

Accordingly, there is no support in the evidence for that portion of Finding XVI above quoted, or the further finding in the same paragraph that "written directions . . . from defendant to use plaintiff were often not issued until after extra work had been accomplished."

The pertinent law, relating to the necessity of proving waiver of a provision in a building contract requiring a written order, is set forth on page 28 hereof. Language from the annotation in 66 A.L.R. 649 follows:

"Stipulation in building and construction contracts, requiring written orders for any alterations or extras

are universally held to be valid and binding upon the parties in the absence of a waiver, modification or abrogation thereof." (at page 651)

"There can be no recovery for extra work ordered by the owner under the condition that it is not an extra but is included in and required by the original contract, although the contractor performs the work under the claim that it is an extra not covered by the contract." (at page 681)

"It is well settled that, in the absence of conduct showing a waiver or modification of a stipulation requiring a written order or agreement for alterations or extra work, or establishing an independent contract for the performance of such alterations or extra work, no recovery can be had therefor by the contractor without a writing in compliance with the provision."

"The foregoing rule has been applied although the extra work was necessary to a performance of the contract (*Ashley v. Henahan*, 56 Ohio St. 559, 47 N.E. 573), and although the extra work was made necessary because of errors in the specifications furnished the contractor by the owner's architect (*Taub v. Woodruff*, 63 Tex. Civ. App. 437, 134 S.W. 750; 152 S.W. 1193)."

"Thus, in *Michaud v. MacGregor*, 61 Minn. 198, 63 N.W. 479, the court said: "The legal effect of provisions of this kind in building contracts is to prevent the contractor from recovering payment upon an implied promise, for extras, in excess of the contract price, by simply showing that they were not included in the original contract, but were necessary for the completion of the building, and that he furnished them. He must go further in his proof, and show that the provision has been directly or indirectly waived by a subsequent valid contract, or by such conduct on the part of the owner of the building as equitably estops him from insisting on

the provision; for it is binding on the parties unless such facts are alleged and proved as relieve them from its obligation.”

“To permit a recovery, even on a quantum meruit basis, without a writing as required by contract, would be to deny the owner the benefit of written evidence, and to subject him to the uncertainties of parol proof, depending on the fluctuating opinion of other persons as to the character and the value of the work, and to bind him against his will. *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202.”

If appellee believed it was doing work beyond the scope of the subcontract as alleged, it should have stayed within the explicit terms of paragraph (e) thereof with which it must have been, in its long experience well familiar, it being a form subcontract issued under the auspices of the Associated General Contractors (See Ex. H).

This relates to all of the items discussed under Parts One and Two of this argument.

Part Four—Interest.

(Finding XVIII; R. 99) (Specification of Errors I. M and II. B).

This relates to the award of interest. Interest is not allowable, of course, on unliquidated claims, *Central Steel Erection Co. v. Will*, *supra*. Reference to Exhibit 31 indicates that the court allowed interest on the first four items, disallowed it on the fifth item. Without prolonging this argument by a discussion of whether these were liquidated or unliquidated indebtednesses, suffice it to say that paragraph (c) of the subcontract provides:

“Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work. . . .”

The court found (Finding V, R. 83) that appellee did not complete its work under the subcontract until October 1961. The first three items of Exhibit 31 show they were paid on April 21, 1961, October 16, 1961 and November 14, 1961, all within the requirements of the subcontract. Further, item No. 3 of Exhibit 31 has reference to temporary work (T. 96, 118-20, Ex. U) which is not a part of Contract 1302 and hence not within the trial court's jurisdiction.

Part Five—Attorney Fees.

(Finding XX, R. 90-1; Conclusion IV); (Specification of Errors I. O and II. D). Allowance to appellee of \$6,500.00 attorney fees.

Appellee brought this action seeking recovery of \$216,391.85 (Ex. A. to appellee's complaint). The court awarded it the sum of \$87,304.45 exclusive of interest and attorney fees which represents 40% of the principal amount asked. In other words, the appellants actually prevailed. While the allowance of attorney fees lies in the discretion of the court, we submit that the appellants could not have in good conscience paid the amounts sought by appellee and were justified in contesting them, particularly where they represent unliquidated damages.

As pointed out in *Macri and Sons v. U.S.*, 313 F.2d 119, (9th C.A. 1963) Alaska, “where a substantial controversy exists . . . no allowance may be made.” Accord:

U.S.A. for General Electric Co. v. Brown Electric Company, (D.C. Virginia 1959), 168 F. Supp. 806, and as pointed out by Judge Hodge in *U.S.A. for Miller and Bentley v. Kelly*, 192 F. Supp. 274, even though the plaintiff obtained a judgment for a portion of its claim, both sides were entitled to attorney fees as the defendant successfully defended the major portion of plaintiff's claim, which is the case here.

Part Six—Bond Premium, Business Tax, Overhead and Profit.

The court in Findings XV and XVI (R. 88-9) (Specification of Errors I. K) determined an allowance for overhead, profit, Alaska Business Tax and bond premium. We have, in Part One of this argument, dealt with the erroneousousness of the awards of overhead and/or profit with respect to items of overhead included in Exhibit 29.

With respect to the Alaska Business Tax, this is beyond the scope of the prayer of the appellee's complaint as was the bond premium (R. 33-8). Furthermore, there is no evidence that either was due and by the terms of the subcontract (Ex. H) the bond was furnished by the general contractor, appellant herein.

Part Seven—Jurisdiction.

(Conclusion I; R. 91; Findings VI and VIID; R. 82) (Specification of Errors I. A and D, II. A).

Appellee alleged jurisdiction under the Miller Act, 40 USC 270a-270e, and under 28 USC 1331 and 1332 (R. 33). The jurisdictional question was put at issue by appel-

lant's answer (R. 41). The court found jurisdiction only under the Miller Act.

The last labor performed and material furnished by appellee was in October 1961 (R. 83). This action was commenced October 31, 1961 (R. 83), less than 90 days after the last work was performed. Appellants contend that it was prematurely brought under 40 USC 270b.

Appellants further contend that under the pleadings, the court erroneously assumed ancillary jurisdiction over appellant, Baker & Ford, with reference to repair of water main leaks (Finding VII D; R. 85), it not having jurisdiction under the Miller Act.

CONCLUSION

The legal principles involved herein relative to admissibility of evidence, quantum of proof and the right to and amount of recovery, are well settled. The application of those principles to the evidence presented on behalf of appellee should have been relatively simple. The conclusions of the trial court to the effect that there was extra work beyond the scope of the contract flies directly in the face of all of the testimony that there was no change in completion dates as between the parties following the issuance of construction schedule (Ex. I) on April 22, and that appellee did not even know of any "acceleration" of the main contract until several months after the work was completed.

The testimony relative to reasonable value of any extra work performed, given only by Mr. Urban, surrounding

Exhibit 29, was, in its entirety, incompetent. Nonetheless, the trial court adopted it as its findings.

The trial court, above and beyond arriving at erroneous and unsupported findings and conclusions, demonstrated his lack of familiarity with the law and the evidence in the following obvious instances in his Memorandum of Decision (R. 71):

(1) In computing increased labor costs per Exhibit 29, Schedule I, based upon a 54-hour week from May 1st to job completion or 28,819½ hours when all of the evidence shouted that a 54-hour week had not been adopted by appellee until August 7th.

(2) Allowing increased camp subsistence costs per Exhibit 9 to the extent of 613 days, which exhibit, on the face of it, showed that appellee's additional man days would only be 95; and the court including in that amount 30 man days for Read Sheet Metal which had already been allowed, and in including 33 man days for Fiberglass Engineering, whose claim was disallowed; and after this error was called to his attention (R. 78-9), reverting to the unsubstantiated sum of \$12,600 set forth in Schedule VIII, Exhibit 29.

(3) Allowing interest to date of judgment, to-wit: October 5th, 1964, on certain sums (R. 76), all of which had been paid in 1961 with the exception of the minor item of \$4,967.13, which was paid in 1962.

(4) In allowing for double-time hours in Schedule I, Exhibit 29, and duplicating that allowance in Schedule VI of the same exhibit.

It is also interesting to note the obvious inconsistencies of the court in admitting and considering evidence; in admitting Exhibits 34, 35 and 41, for instance, dealing with a different contract entirely, Number 1282; but rejecting offered Exhibits 42 and 43 because they related to Contract 1282 and not 1302; and the rulings of the trial judge in permitting evidence relating to Exhibit 29 under the "Federal Shop Book" rule at a time when the records, if any, from which the summaries were made were not available for cross-examination, but rejecting similar summaries proposed by appellants until such records were obtained, necessitating an overnight trip during trial from Fairbanks to Bellingham, Washington, and return by appellant's witness, McGonigal (T. 561-79, 593, 700).

Appellants are at a complete loss to explain or rationalize the erroneous and inconsistent treatment of the evidence by the trial judge, but submit that one adopting an objective approach thereto cannot but be convinced that the judgment was manifestly erroneous and the result of either prejudice or a complete misapprehension and misapplication of the evidence and the law.

This trial was originally set for hearing in Anchorage for April 1st, 1964. It was transferred to Fairbanks and came on for hearing on April 2nd, 1964, because of the major earthquake which struck Anchorage the previous Friday. Whether the judge, during the course of the trial, was preoccupied with concern over that major disaster, we have no way of knowing. We are convinced, however, that his treatment of the evidence herein makes it ap-

parent that this judgment should be set aside and appellee's action dismissed with judgment for costs and attorney fees for appellant.²

Respectfully submitted,

MIKE STEPOVICH

BRUCE T. RINKER

Attorneys for Appellants

2. Note: All of the errors urged herein were presented in detail to the trial court prior to entry of judgment. (T. 717-56) (Memorandum, R. 106-45).

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

MIKE STEPOVICH

BRUCE T. RINKER

Attorneys for Appellants

APPENDIX A

APPELLEE'S EXHIBITS

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
1	Letter dated 10-5-61 to Baker & Ford from Corps of Engineers	Pre-trial	Pre-trial	
2	Letter dated 10-19-61 to Baker & Ford from Corps of Engineers	Pre-trial	Pre-trial	
3	Letter dated 8-3-59 to Baker & Ford from Urban Plumbing & Heating.....	Pre-trial	60	
4	Letter dated 9-4-59 to Baker & Ford from Urban Plumbing & Heating.....	Pre-trial	12	
5	Letter dated 5-25-60 to Urban Plumbing & Heating from Fiberglass Co.....	Pre-trial	110	
6	Inter-Office memo dated 2-16-61.....	Pre-trial	Not offered	
7	Inter-Office memo dated 3-19-61.....	Pre-trial	Not offered	
8	Original submittal, undated, in amount of \$78,379.23	Pre-trial	109	
9	Submittal to L. Bernardi, prior to May 21, in amount of \$48,470.78	Pre-trial	109	
10	Subcontract dated 5-8-59 between Patti-MacDonald Const. & Urban Plbg. & Htg.....	Pre-trial	Not offered	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
11	Letter dated 4-3-62 to Contracting Officer from Urban Plg. & Htg.....	Pre-trial	280	
12	Tabulation of air freight bills.....	Pre-trial		682
13	Proposal to Urban Plbg. & Htg. from Fiberglass, dated 3-26-59	Pre-trial	Not offered	
14	Tabulation of extras and labor, undated, in amount of \$130,429.00	Pre-trial	Not offered	
15	Memo to Bob Brewer from F. Urban, dated 2-13-61	Pre-trial	Not offered	
16	Invoice from Peerless Pacific Co. dated 6-9-60.....	Pre-trial	Not offered	
17	Letter dated 8-7-62 to Urban Plbg. & Htg. from Read Sheet Metal	Pre-trial	12	
18-A		Pre-trial	79	
thru 18-I	File of correspondence.....	Pre-trial	12	
19	Invoice dated 11-18-60 from Urban Plbg. & Htg. to Baker & Ford.....	Pre-trial	41	
20	Memo dated 12-8-60 to L. Bernardi.....	Pre-trial	12	
21	Invoice dated 11-18-60 from Urban Plbg. & Htg. to Baker & Ford.....	Pre-trial	39	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
22	Memo dated 9-29-59 to F. Urban from Bob Brewer	Pre-trial	Not offered	
23	Letter dated 10-23-59 to Brodie Nat'l from Urban....	Pre-trial	12	
24	Letter dated 10-27-59 to Urban from Brodie National	Pre-trial	12	
25	Letter dated 4-29-60 to Baker & Ford from U. S. Army Engineers	Pre-trial	12	
26	Letter dated 6-24-60 to Baker & Ford from U. S. Army Engineers	Pre-trial	12	
27	Letter dated 1-29-60 to Contracting Officer from Baker & Ford.....	Pre-trial	12	
28	Letter to Baker & Ford from Contracting Officer.....	Pre-trial	12	
29	Urban's Acceleration claim.....	Pre-trial	277	
30	Plans, Composite Bldg., Clear, Alaska.....	228	229	
31	Figures re testimony of F. Urban.....	278	278	
32	Figures re testimony of F. Urban.....	297	297	
33	Letter 5-21-60 w/attachments.....	298	298	
34	Change Order 6-24-60.....	298	300	
35	Change Order 2-3-61.....	298	300	
36	Change Order 4-5-61.....	350	Not offered	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
37	Bar Graph 7-6-59.....	389	Not offered	
38	Letter dated 10-9-59.....	389	Not offered	
39	Revised Construction Progress Chart dated January, 1960	393	Pre-trial	
40	Change Order dated 3-18-60.....	395	Not offered	
41	Acceleration of Const., 3-30-60.....	401	404	
42	Change Order dated 6-24-60.....	465		468
43	Change Order dated 3-11-61.....	466		468
44	Recap of manpower tabulation.....	685	687	
45	Payroll tabulation, May to Nov., 1960.....	687	692, 694	4

APPENDIX B

APPELLANT'S EXHIBITS

No.	Description	Identified	Admitted	Rejected
A	Payrolls 1 through 67; and 69, 1959-1960.....	Pre-trial	Pre-trial	
B	Modification No. 15, 2 pcs., Contract No. 1302.....	Pre-trial	Pre-trial	
C	Letter dated 1-9-61 to Baker & Ford from Urban Plbg. & Heating.....	Pre-trial	Pre-trial	
D	Payrolls 1 through 4, October 1961.....	Pre-trial	Pre-trial	
E	Letter dated 12-5-61 to Baker & Ford from Urban Plbg. & Htg.....	Pre-trial	Pre-trial	
F	Change Order w/ transmittal letter, dated 5-10-62	Pre-trial	Pre-trial	
G	Letter dated 5-15-62 to Corps of Engineers from Baker & Ford.....	Pre-trial	Pre-trial	
H	Copy of subcontract between Baker & Ford & Urban Plbg. & Htg. dated 6-25-59.....	Pre-trial	Pre-trial	
I	Original Bar Graph Chart, 1960.....	Pre-trial	Pre-trial	
J	Letter 8-16-60 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
K	Summary of man days for week ending 5-8-60 5-8-60 through 12-1-60.....	Pre-trial	12	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
L	Recap of man days.....	Pre-trial	12	
M	Plumbers' Invoice	Pre-trial	12	
N-1 thru N-5	Communications from R. Brewer.....	Pre-trial	12	
O	Original Contract between Corps of Engineers & Baker & Ford.....	Pre-trial	12	
P-1 thru P-3	Correspondence re electric water coolers.....	Pre-trial	12	
Q	Letter dated 4-28-59 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
R	Letter dated 7-7-59 with attached subcontract.....	12	12, 319	
S	Letter dated 11-18-60 to Baker & Ford from Urban Plbg. & Htg.	12	12	
T	Letter dated 2-24-61 to Baker & Ford from Urban Plbg. & Htg.	12	12	
U	Letter dated 11-14-61 to Urban Plbg. & Htg. from Baker & Ford.....	12	12	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
V	Letter dated 5-10-62, attn: Mr. Davidson from Mr. Rinker	12	12	
W	Telegram dated 4-29-60.....	12	12	
X	Tabulation of labor.....	Pre-trial	12	
Y	Tabulation	Pre-trial	12	
Z	Letters dated 10-2-63 and 10-25-63 with time sheet summaries	Pre-trial	12	
AA	Letter 8-16-20 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
BB	Letter 11-17-60 to Urban Plbg. from Baker & Ford	Pre-trial	12	
CC	Letter dated 4-10-61 to Urban Plb. & Htg. from Baker & Ford.....	Pre-trial	12	
DD	Letter dated 4-10-61 attn: Mr. Davidson from Baker & Ford.....	Pre-trial	12	
EE	Letter dated 4-21-61, attn: Mr. Davidson from Mr. Rinker	Pre-trial	12	
FF	Letter 10-17-61 to Baker & Ford from Urban Plbg. & Htg.	Pre-trial	12	
GG	Letter 10-19-61 to Urban Plbg. & Htg. from Baker & Ford	Pre-trial	12	

<i>No.</i>	<i>Description</i>	<i>Identified</i>	<i>Admitted</i>	<i>Rejected</i>
HH	Letter dated Sept. 2 to Baker & Ford from Corps of Engineers	139	139	
II-1	Specifications notebook	264	264	
II-2	Specifications notebook	313	313	
JJ	Statement of man days.....	559	567	
KK	Man days subsistence account.....	565	645	
LL	Breakdown of hours.....	589	592	
MM	Total man days.....	700	704	
NN-1 thru NN-4	Letters dated 7-15-60, 4-11-60, 11-5-59, 8-19-59....	704	706	8
OO	Letter dated 4-25-60.....	706		707

FEB 10 1967

No. 20384

IN THE
**United States Court of Appeals
For the Ninth Circuit**

BAKER & FORD Co., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLEE

FILED

MAR 29 1966

WM. B. LUCK, CLERK

DONALD McL. DAVIDSON
WILLIAM B. MOORE
Attorneys at Law
929 Logan Building
Seattle, Washington 98101
Attorneys for Appellee

SUBJECT INDEX

	<i>Page</i>
Jurisdiction (Findings V, VI, Conclusion of Law I)....	1
District Court	1
This Court	2
Counter-Statement Of The Case.....	2
Summary Of Argument.....	7
Argument	9
The Finding That an Acceleration Occurred Was Clearly Required by the Proof at Trial (Findings IX, XII)	9
The Evidence Establishes That the Acceleration In- creased the Burdens of the Subcontractor Beyond Those Originally Contemplated Under the Contract and Therefore Constituted "Extra Work" Subject to Compensation (Findings X, XI, XII, XIV).....	11
Urban Did Not Voluntarily Incur the Increased Costs of the Acceleration.....	13
Competent Evidence Established the Fact of Dam- age and its Amount (Findings XIII, XVI).....	16
A. Mr. Urban's Testimony Based on His Opinion and Estimates Was Competent to Establish the Quantum of Damage.....	17
B. The Summaries Were Properly Admissible In Evidence and Opportunity Was Afforded for Examination of the Core Facts Used in Their Preparation	20
C. Damages Were Established With Reasonable Certainty	21
The Contract Requirement That Extras Be Previ- ously Agreed Upon in Writing Was Waived (Find- ing XIX)	23

	<i>Page</i>
Extras Beyond the Scope of the Subcontract Were Performed by Urban and Substantial Evidence Supports the Award of Compensation.....	24
Connection of Kitchen Equipment.....	26
Connecting Waterlines and Drains to Refrigerator...	26
Installation of Grease Interceptor Extensions.....	27
Repairing Water Main Leak.....	27
Bond Premium and Alaska Business Tax (Finding XV)	29
The Award of Interest Was Proper Under the Undisputed Facts (Finding XVIII).....	30
The Award of Attorney Fees Was Proper (Finding XX)	31
Contrary to Appellant's Insinuations, the Trial Judge Conducted a Fair and Impartial Inquiry.....	32
Motion for Costs of Printing Briefs and Attorney Fees on Appeal	33
Conclusion	34
Certificate of Compliance	35
Appendix	1-4

TABLE OF CASES

<i>Allegheny County Housing Au. v. Caristo Const. Corp.</i> , 90 F.Supp. 1007 (D.C. Pa. 1950).....	16
<i>American Crystal Sugar Co. v. Mandeville Island Farms</i> , 195 F.2d 622 (9th Cir. 1952).....	34
<i>Beaty v. Brock & Blevins Co.</i> , 319 F.2d 43 (6th Cir., 1963).....	11

	<i>Page</i>
<i>Boomer v. Abbett</i> , 263 P.2d 476 (Cal. 1953).....	16
<i>Boyd Callan, Inc. v. United States</i> , 328 F.2d 505 (5th Cir. 1964).....	34
<i>Buza v. Columbia Lumber Co.</i> , 395 P.2d 511 (Alaska, 1964).....	18, 32
<i>Cliquot's Champagne</i> , 3 Wall 114 (1866).....	18
<i>Commercial Wholesalers, Inc. v. Investors Commercial Corp.</i> , 172 F.2d 800 (9th Cir. 1949).....	34
<i>Congress & E. Spring Co. v. Edgar</i> , 99 U.S. 645 (1879)	18
<i>Continental Casualty Company v. Schaefer</i> , 173 F.2d 5 (1949).....	11, 23
<i>Frank Sullivan Co. v. Midwest Sheet Metal Works</i> , 335 F.2d 33 (8th Cir., 1964).....	22
<i>Kellogg v. Wilcox</i> , 283 P.2d 677 (Wash. 1955).....	33
<i>Lessig v. Tidewater Oil Co.</i> , 327 F.2d 459 (9th Cir., 1964).....	17, 18
<i>Lichter v. Mellon-Stuart</i> , 193 F.Supp. 216 (D.C., Pa., 1961).....	25
<i>Linen Thread Co. v. Shaw</i> , 9 F.2d 17 (1st Cir., 1925)	22
<i>Lundgren v. Freeman</i> , 307 F.2d 104 (9th Cir., 1962)....	9
<i>Macri v. United States</i> , 353 F.2d 804 (9th Cir., 1965).....	24, 30, 31, 32
<i>Miller v. Othello Packers</i> , 67 Wn.2d 829 (1966).....	25
<i>Murphy v. Kodz</i> , 351 F.2d 163 (9th Cir., 1965).....	28
<i>Northeast Clackamas C.E. Co-op v. Continental Gas Co.</i> , 221 F.2d 329 (9th Cir., 1955).....	25
<i>Sam Macri & Sons, Inc. v. U.S.A.</i> , 313 F.2d 128.....	20, 23, 33

	<i>Page</i>
<i>Specialty Assembling & Packing Co., Inc., v. United States</i> , (C. of Cls. Slip Opinion Jan. 21, 1966)	22
<i>Standard Oil Co. v. Moore</i> , 251 F.2d 188 (9th Cir., 1958); cert.den. 356 U.S. 975	18, 19
<i>Standard Oil Company v. Perkins</i> , 347 F.2d 379 (9th Cir., 1965)	22
<i>Story Parchment Co. v. Paterson Paper Co.</i> , 282 U.S. 555 (1931)	21
<i>Union Carbide & Carbon Corp. v. Nisley</i> , 300 F.2d 561 (10th Cir., 1962)	17
<i>United States for Brady Floor Covering, Inc. v. Breedon</i> , 110 F.Supp. 713 (D.C. Alaska, 1953)	33
<i>United States v. Elwin</i> , 219 F.Supp. 418 (D.C. Alaska, 1961)	33
<i>United States v. Gypsum Co.</i> , 333 U.S. 364 (1948)	9
<i>United States v. Hensler</i> , 125 F.Supp. 887 (D.C. Cal. 1954)	16
<i>United States v. Reiten</i> , 313 F.2d 673 (9th Cir., 1963)	2
<i>United States v. Smith</i> , 94 U.S. 214 (1877)	22
<i>Wunderlich Contracting Co. v. United States</i> , 240 F.2d 201 (10th Cir., 1957); cert.den. 353 U.S. 950	11

ANNOTATIONS AND TEXTBOOKS

5 A.L.R.3d 1040 (1966)	28
13 Am.Jur.2d 21-22, <i>Building Contracts</i> §19 (1964)	25
McCormick, <i>Evidence</i> 142, §65 (1954)	17

STATUTES & RULES

	<i>Page</i>
Alaska Comp. Laws Anno., §55-11-51.....	32
Alaska Rules of Civil Procedure, Rule 82.....	32
A.S. 09.60.010	33-34
Federal Rules of Civil Procedure,	
Rule 52(a)	9
Rule 54(d)	34
28 U.S.C. §1291.....	2
§1294.....	2
§1332.....	1
§1912.....	34
40 U.S.C. §§270(a)-270(e).....	1

OTHER AUTHORITIES

Canons of Professional Ethics, 1 and 32.....	32
--	----

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20384

BAKER & FORD Co., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLEE

JURISDICTION

(Findings V, VI, Conclusion of Law I)

District Court

Jurisdiction was alleged under the Miller Act (40 U.S.C. §270(a) to §270(e)) and under 28 U.S.C. §1332 (R. 1). The court found that plaintiff finished its work under the subcontract in November or December of 1960 (R. 83).

The complaint was filed October 31, 1961 (R. 1). The court determined this was ample basis for jurisdiction under the Miller Act (Finding VI; R. 84).¹

Facts adequate to sustain jurisdiction based on diversity of citizenship (Finding I; R. 82, 83) were also found.

This Court

This Court has jurisdiction of this appeal under 28 U.S.C. §1291 and §1294.

COUNTER-STATEMENT OF THE CASE

This is not a complicated case on the law; slightly more so on its facts. Basically, it follows the pattern of the usual Miller Act controversy between a prime contractor and a subcontractor. Urban Plumbing & Heating Co. (hereafter "Urban") is the subcontractor, was plaintiff and prevailing party below. Baker & Ford Co. (hereafter "Baker" or "Appellant") is the prime contractor and Appellant in this Court.

Baker, as the prime contractor, was engaged in work on a ballistic missile early warning site for the U.S. Department of Defense under several contracts, at Clear, in the State of Alaska. Baker's job requirements on the contract

1. Appellant argues that work performed by Urban during October, 1961, made the complaint premature and defeats Miller Act jurisdiction (Br., p. 65). The argument is frivolous. The court found that this work was a modification to the contract (Finding V, R. 84), following completion in 1960. Moreover, a supplementary complaint was filed on March 22, 1963 (R. 33), more than 90 days after performance of the added work and prior to acceptance. Miller Act jurisdiction therefore attached under the supplementary complaint in any event. *United States v. Reiten*, 313 F.2d 673 (9th Cir., 1963).

here involved were spelled out in Contract DA-92-507eng-1302 (hereafter "1302"). Contract 1302 called for the construction of a composite building consisting of two dormitory wings and eating and recreational facilities to be served by underground sewers, water, power and other utilities (Ex. O).

Baker awarded the mechanical work as set out in the plans and specifications on 1302 to Urban. (Urban's job responsibilities are described at Tr. 32-36 Tr. 113.)^o

Originally, the contract called for final completion on May 31, 1960 (Ex. O). Due to strikes during the summer of 1959, this completion date could not be met. In fact, virtually no work was performed during the 1959 construction season (Tr. 432). Accordingly, Baker agreed with the Army Corps of Engineers to set a new feasible and reasonable completion date (Tr. 392, 397; 400; Ex. 38; Finding VIII, R. 85, Unchallenged here). After a considerable period of negotiation, Baker and the Army Corps of Engineers formalized their agreement on completion dates as follows:

First Wing	—	October 15, 1960
Second Wing	—	November 15, 1960
All Other	—	December 15, 1960

(Exs. 27, 28)

As thus formalized, this agreement was known as "Modification 6."

The Department of Defense, however, was most anxious to man the Ballistic Early Warning Site at the earliest

^oTr refers to the reporter's transcript; R refers to the court file.

possible date. Accordingly, the Corps of Engineers negotiated with Baker to accelerate the Modification 6 completion dates. Baker knew 1302 would be accelerated and that additional money was available as compensation for the speedup as early as April 8, 1960. This was established unequivocally by the testimony of Baker's Project Manager, Bernardi (Tr. 408, 413, 414). Written corroboration fixing the approximate periods of these negotiations appears in a letter from the Corps of Engineers dated April 29, 1960, which directed advancement of the completion dates on 1302 by one month and requested Baker to submit a cost proposal (Ex. 25). Immediately thereafter, early in May, Sam Baker, President of Baker, told Urban "that the job had been accelerated and we [Urban] should get a cost proposal into Baker & Ford at the earliest possible convenience." (Tr. 104. And see Tr. 105; 48-49.)

Shortly after or at the time it became known the contract would be accelerated, Baker posted a construction schedule to be met by the prime contractor and all subcontractors.² This schedule required completion by them at the same dates directed by the Corps of Engineers in

2. Markings on the schedule indicated it was issued April 22 (Ex. I; see Tr. 424). In its brief, Baker underplays, even appears to deny (Br., p. 33) the simultaneous occurrence of the Corps of Engineers' negotiation with Baker looking toward advanced completion dates and the posting of the construction schedule setting virtually the same completion dates ultimately agreed to between them. Plainly, as the trial court impliedly found, these events were no coincidence. (See also Tr. 421-422). The construction schedule was the implementation of Baker's anticipated agreement with the Corps of Engineers as to the advanced completion dates or implementation of the direction to so accelerate which Baker was obligated to do under his contract with the Government regardless of agreement by formal modification of his contract.

its letter to Baker as to the first and second wing and one month earlier than directed by the Corps of Engineers as to all others (Ex. I). As ultimately formalized in Modification 11 executed June 27, 1960, completion dates were set as follows:

First Wing	— September 15, 1960
Second Wing	— October 15, 1960
All Other	— November 15, 1960

(Ex. 26)

At this point, of course, under the terms of the sub-contract, the completion dates binding Baker became equally binding on Urban (Ex. H; Tr. 427, 429, 431, 432). Some 80% of Urban's job responsibilities were accelerated (Tr. 113), particularly the outside utility work. Baker gave every indication during physical construction that Urban would be compensated (Tr. 104, 107). Baker chose not to disclose, however, that he had actually formalized an agreement with the Corps of Engineers providing increased compensation for the acceleration (Tr. 112). Meanwhile, Baker told Urban to work according to the construction schedule (Tr. 636) to figure the job done by September 15 (Tr. 657), and to "get the thing speeded up" (Tr. 444. See also p. 11, McGonigal Deposition, at Tr. 773, *et seq.*). Urban, in response to Baker's invitation, put in notice of his forthcoming claims for increased costs early in May, 1960 (Tr. 423, and see Tr. 106). Early in May, 1960, Urban submitted an estimate of costs (Ex. 8). Baker said to refigure it on a different basis. Urban did so and resubmitted another cost claim shortly thereafter (Ex. 9) (See Tr. 49, 107, 108). Both claims included requests of

Urban's own subcontractors for acceleration costs. Repeatedly thereafter, Urban inquired as to the disposition of the claim, unaware of the fact that Baker, on June 27, 1960, had formally entered into a modification with the Corps of Engineers (Tr. 181); Ex. AA, Ex. 18(a), 18C; Tr. 457, 468; Exs. S, T; Tr. 662, 669, 670.

In each instance, Baker put Urban off. Finally, at a meeting at the Washington Athletic Club in Seattle long after completion of the work, the matter came to a head. Urban again sought to settle with Baker on a price for the costs incident to the acceleration. But to the astonishment of Urban, Sam Baker, President of Baker, killed the negotiation aborning with his remark, "What acceleration"? (Tr. 112; 186).

It now being clear that further negotiation with Baker would be futile, Urban commenced this action in the United States District Court of Alaska for damages attributable to the acceleration (R. 1). In addition, Urban sought compensation for items of extra work alleged to be beyond the scope of the subcontract (R. 35-36). Baker, in its Answer, generally denied everything (R. 6-7, R. 41-42), and raised questions of the Statute of Limitations and Urban's legal capacity to sue (R. 42). An extensive trial followed.

Shortly thereafter, the court rendered a Memorandum of Decision, finding substantially for Urban on the acceleration claim and granting and denying some items of Urban's extra work claims (R. 71-76). Baker then filed a list of "Objections to Memorandum of Decision" (R. 77-

81). Findings of Fact, Conclusions of Law and Judgment issued (R. 82-95). Baker then moved for a new trial (R. 96) and to amend the Findings of Fact (R. 97). Memoranda were submitted on each of the motions by both parties and after a thorough review, the court adhered to its earlier judgment (R. 164-166). This appeal follows from the final Judgment and denial of the post-trial motions.

SUMMARY OF ARGUMENT

The issues raised by Appellant constitute a thinly supported attack on the District Court's findings of facts and determinations as to the admissibility of evidence, all of which were supported and well within that court's discretion under universally recognized standards of review. We have attempted to isolate the vital legal points raised by appellants, and where factual issues are involved, point out to the court some of the direct evidence which sustains the findings of the District Court. We believe the record will establish these points:

- A. THE FINDING THAT AN ACCELERATION OCCURRED WAS CLEARLY REQUIRED BY THE PROOF AT TRIAL.
- B. THE EVIDENCE ESTABLISHES THAT THE ACCELERATION INCREASED THE BURDENS OF THE SUBCONTRACTOR BEYOND THOSE ORIGINALLY CONTEMPLATED UNDER THE CONTRACT AND THEREFORE CONSTITUTED "EXTRA WORK" SUBJECT TO COMPENSATION.
- C. URBAN DID NOT VOLUNTARILY INCUR THE INCREASED COSTS OF THE ACCELERATION.
- D. COMPETENT EVIDENCE ESTABLISHED THE FACT OF DAMAGE AND ITS AMOUNT.

- E. THE CONTRACT REQUIREMENT THAT EXTRAS BE PREVIOUSLY AGREED UPON IN WRITING WAS WAIVED
- F. EXTRAS BEYOND THE SCOPE OF THE SUBCONTRACT WERE PERFORMED BY URBAN AND SUBSTANTIAL EVIDENCE SUPPORTS THE AWARD OF COMPENSATION.
 - 1. CONNECTION OF KITCHEN EQUIPMENT
 - 2. CONNECTING WATERLINES AND DRAINS TO REFRIGERATOR
 - 3. INSTALLATION OF GREASE INTERCEPTOR EXTENSIONS
 - 4. REPAIRING WATER MAIN LEAK
- G. BOND PREMIUM AND ALASKA BUSINESS TAX ARE PROPER ITEMS OF DAMAGE.
- H. THE AWARD OF INTEREST WAS PROPER UNDER THE UNDISPUTED FACTS.
- I. THE AWARD OF ATTORNEY'S FEES WAS PROPER.
- J. CONTRARY TO APPELLANT'S INSINUATIONS, THE TRIAL JUDGE CONDUCTED A FAIR AND IMPARTIAL INQUIRY.

Appellant's brief contains 42 specifications of error, 23 of which are apparently consolidated under its acceleration argument (Part One), 11 discussed under the four specific extra claims (Part Two), one discussed under the requirement of a written order (Part Three), two mentioned under interest (Part Four), two cited under attorneys' fees (Part Five), one argued under bond premium (Part Six), and three considered under jurisdiction (Part Seven).

Many specifications of error are said to be argued in

more than one section. Appellee finds no argument as to specifications of Error III, IV, V and VI.

ARGUMENT

The Finding That an Acceleration Occurred Was Clearly Required by the Proof at Trial (Findings IX, XII).

As Baker acknowledges, the finding (R. 86-87) that Urban's performance under the subcontract was accelerated must be "clearly erroneous," before this court may substitute its appraisal of the evidence for that of the District Court, Rule 52(a) F.R. Civ. P. Under familiar principles limiting review, this means the finding must stand unless:

". . . The reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

This limitation on review applies equally whether the finding is predicated on the credibility of witnesses or is a matter resolved largely on undisputed evidence. *Lundgren v. Freeman*, 307 F.2d 104, 113-115 (9th Cir., 1962).

Abundant evidence, testimonial and written, much of it detailed in the counter-statement of facts but repeated here for emphasis, demonstrates that earlier completion dates were set by Baker than were originally contemplated, or could reasonably have been required, under the subcontract (Tr. 73). Baker acknowledges that the original May 31, 1960 completion date "could not be met" (App. Br., p. 23), due to strikes (Tr. 608). New completion dates

were therefore set. These dates were a reasonable forecast of the minimum time necessary to complete work under 1302 at a price fairly within the responsibilities of the parties under the contract as originally written (Tr. 731, 392, 397, 400; see Ex. 38; Finding VIII; R. 85 (undisputed here)). These dates were known to all parties involved with 1302 and were formalized in Modification 6 as follows:

First Wing	—	October 15, 1960
Second Wing	—	November 15, 1960
All Other	—	December 15, 1960

Again, it is undisputed that these dates were in turn advanced by Modification 11, as follows:

First Wing	—	September 15, 1960
Second Wing	—	October 15, 1960
All Other	—	November 15, 1960

Baker did not disclose to Urban that it had reached agreement with the Corps of Engineers as to compensation for the acceleration (Tr. 112-125, 126, 274). Baker told Urban to work according to the construction schedule (Tr. 636) and to "get the thing speeded up" (Tr. 444), giving no indication that Urban would not be compensated. On the contrary, Urban had every reason to believe, and did believe, from Baker's representations that Urban would receive all the compensation to which it was entitled due to the acceleration (Tr. 104, 107, 169). In any event, under the terms of the subcontract, Urban was bound to the new completion dates set in Modification 11 to the same extent as was Baker (See

Ex. H and Ex. O), and this was the general understanding of the parties as well (Tr. 430-433). Pursuant to the understanding that the contract would be accelerated, Urban did in fact accelerate its performance under 1302 (Tr. 49), although none of the advanced dates were as originally contemplated under the subcontract or Modification 6 (Tr. 73).

In the face of this overwhelming and largely undisputed evidence, we submit that the District Court had no alternative but to reject Baker's contention that there was no acceleration.

The Evidence Establishes That the Acceleration Increased the Burdens of the Subcontractor Beyond Those Originally Contemplated Under the Contract and Therefore Constituted "Extra Work" Subject to Compensation (Findings X, XI, XII, XIV).

As was succinctly stated by Judge Pickett of the Tenth Circuit, citing this Court's decision in *Continental Casualty Company v. Schaefer*, 173 F.2d 5 (1949):

"Burdens other than those contemplated by the contract, may not be placed upon the contractor without additional compensation."

Wunderlich Contracting Co. v. United States, 240 F.2d 201 at p. 205 (10th Cir., 1957); cert. den. 353 U.S. 950. See also *Beatty v. Brock & Blevins Co.*, 319 F.2d 43, 44 (6th Cir., 1963).

The Court having found there was an acceleration and that Baker had requested and received a change order allowing at least \$146,600 to Baker also found that Urban's

work had likewise been accelerated and Urban was likewise entitled to compensation. The evidence establishes the obvious fact that such a speedup or acceleration results in increased costs, such as having extra manpower, working longer hours, obtaining extra equipment, tools and facilities, expediting delivery of material by air freight and generally sacrificing efficiency in order to gain time. Most of these very items of increased cost are noted in a cost proposal from Baker to the Army Corps of Engineers (Ex. 33, and See Tr. 405-408. See also Ex. 41, p. 4). And it is readily apparent that none of these costs are in their nature peculiar to the operation of a general contractor as distinguished from a subcontractor. Abundant evidence of damage, its nature and extent, was detailed to the court. The testimony showed that fully 80% of Urban's work was accelerated (Tr. 113). Examples of loss of efficiency and resultant increased cost were cited to the court (Tr. 54). It was demonstrated that longer work hours were necessitated, thereby causing double-time wage rates and raising overall labor costs (Tr. 60-62). With additional labor came additional equipment and tool costs (Tr. 115, 116). Evidence was adduced concerning air freight charges made necessary by the acceleration (Tr. 208-209). Each item of damage fairly attributable to the acceleration was compiled in Exhibit 29, and the basis of computation appeared in the attached schedules. Where available, invoices from the job itself were tabulated (Tr. 208). All items of damage were gone over intensively on direct examination (Tr. 187-202, Tr. 208-219), and each was subjected to scrutiny under vigorous

cross-examination (Tr. 234-263). In short, the court was fully apprised as to the exact nature and basis of Urban's claims and was adequately apprised through the cross-examination of all Appellant's views of the weakness in each item underlying the evidence.

Urban Did Not Voluntarily Incur the Increased Costs of the Acceleration.

Despite its increased cost, the Baker argument runs, Urban cannot recover for the acceleration because it finished the project within the allotted by the schedule, or as Baker more baldly states the proposition:

“The attempt to meet [the advanced] completion date was a voluntary undertaking by all concerned.”
(App. Br., p. 25)

The merest assertion of such a proposition begs credulity. We need not vouch for Urban's altruistic qualities to confidently assert Urban's altruism does not extend to the voluntary undertaking of losses in a business conducted for profit. Inasmuch as Baker's argument on this point is the keystone of its logic, upon which all else depends, we shall nonetheless treat the question with the same degree of importance as it bears to Appellant's argument.

Appellant's theory is that Modification 6 provided for considerable cushion or slack, that would permit the completion dates to be advanced by 30 days. Thus, it is said, Baker posted a construction schedule (Ex. I) on its wall reflecting the shorter period and set these as “target dates” for Urban and other subcontractors. The facts

show Baker then told them, in the words of witness Bernardi, Baker's Project Manager at Clear, "Let's get the thing speeded up, let's get on with the work here." (Tr. 444). In a similar vein, Sam Baker, President of Baker, told Urban's Project Manager, Brewer, "To figure all the job completed by September 15 . . ." (Tr. 657).

Simultaneously with the posting of the schedule and the quoted directions from Baker, in what Baker maintained was a coincidence, the Army directed Baker to accelerate 1302 by one month and put in its price for the speedup (Tr. 422). This directive bound Urban equally with Baker to the advanced completion dates (Tr. 427, 431). Subsequent formalization of the acceleration placed the threat of liquidated damage upon Urban.

Baker's logic plainly requires the assumption that the Army's direction to Baker accelerating performance of 1302 affected only Baker and not Urban. But a gapping fault in this logic is revealed by Mr. Baker's own observation as to the interrelation and unitary nature of the work performed by the prime and the sub:

"In building," said Baker, "there are so many things that can't be done until someone else completes their work." (Tr. 613; see also Tr. 50.)

It requires little understanding of construction to realize that mechanical work often precedes and must at least be coordinated with other aspects of a building. Finally and conclusively, the testimony is clear that Urban enjoyed no cushion under the acceleration schedule (Tr. 158-159). Manifestly, an acceleration of Baker's perform-

ance would have a similar effect on Urban.

In this factual setting, we submit the District Court was entitled to disbelieve Baker's protestation that the making of the schedule and the preparation of Modification 11, each with substantially identical completion dates, was coincidental (Tr. 417-418).³ And in view of Baker's direction to "Get the thing speeded up" (Tr. 444), its requests for cost proposals for so doing, and Urban's reasonable expectation of compensation (Tr. 104, 107), it cannot fairly be concluded that Urban undertook the additional work as a volunteer.

That Urban did not object to the schedule and agreed to try to meet it, is not tantamount to saying, as Baker apparently does, that Urban expected no compensation for its increased efforts (See Tr. 169). On the contrary, at about the time the schedule was first released, Urban's job superintendent, Brewer, asked Baker for additional compensation for the acceleration (Tr. 423) and we have seen that Urban fully expected to receive it (Tr. 169). Indeed, in view of the fact that Baker's agreement with the Army to accelerate the completion dates was equally binding on Urban under the subcontract, protest would have been a futile gesture. Baker seeks also to draw the

3. Baker claims Modification 11 with the Army occurred long after posting of the schedule. It is true the agreement and final price was formalized on June 27, 1960. (See Ex. 26.) But the earlier completion date ultimately incorporated in Modification 11 was requested of Baker by the Army along with an invitation to submit a price proposal on April 29, 1960 (Ex. 25, Tr. 502, 503) and it was common knowledge on the job as early as April 8, 1960 that the job would be accelerated (Tr. 414). Urban's first cost proposal was in Baker's hands in May 1960 (Ex. 8) and was resubmitted shortly thereafter (Ex. 9). (See Tr. 49, 107, 108.)

facile conclusion that Urban's compliance with the schedule was a voluntary effort from the circumstance that Urban did not know the contents of Modification 11 until long after the contract was completed. (The only substantive provision of Modification 11 unknown to Urban was the provision for payment to Baker alone of some \$146,000.00.) This fact will simply not sustain the burden of the conclusion Baker attempts to draw from it. Passing the circumstance that Baker seeks to gain by its own wrongful failure to protect Urban's interest in negotiating costs with the Corps of Engineers,⁴ the fact remains that an acceleration of Urban's obligation occurred and no compensation for Urban was forthcoming despite its request for and reasonable expectation of payment, an expectation nurtured by Baker himself (Tr. 104) until the meeting at the Washington Athletic Club.

Competent Evidence Established the Fact of Damage and Its Amount (Findings XIII, XVI).

Baker's attack on the court's findings as to the damage

4. An evolving line of cases is fleshing out the rights and obligations among and between the prime contractor, the subcontractor and the owner. Of course, the sub is not in contractual privity with the owner. Yet agreements between the owner and the prime have a direct effect on the sub, a classic illustration of which is exhibited in the case at bar. Accordingly, the cases have spoken of the relationship between prime and sub as "somewhat analogous to that of trustee and *cesta que trust*" [*Allegheny County Housing Au. v. Caristo Const. Corp.*, 90 F. Supp. 1007, 1010 (D.C. Pa. 1950)] requiring the prime to transmit and urge the subcontractor's claims before the owner. *Boomer v. Abbott*, 263 P.2d 476 (Cal. 1953), and see *United States v. Hensler*, 125 F. Supp. 887 (D.C. Cal. 1954). Given this duty, we think it an obvious corollary, applicable to this case, that the prime must protect the subcontractor. Here this is what Baker pretended to do and is what Urban thought was happening. But Baker instead negotiated for itself alone although it then had in hand Urban's cost estimates.

sustained by Urban breaks down into three major points. First, conceding the fact of damages, it is contended that the testimony of Mr. Urban could not establish the quantum of damage due to the acceleration. This follows, maintains appellant, because Mr. Urban's testimony was based on his opinion and estimates, was hearsay and not based on personal knowledge. Secondly and separately, appellant contends in the teeth of the evidence, that certain summaries must be excluded because they were unavailable for his inspection and cross-examination (App. Br. p. 28, 29). Appellant's final point is a rehash of his running quibble with the District Court over the computation of damages. As we will show, each of these claims lacks merit.

A. Mr. Urban's Testimony Based on His Opinion and Estimates Was Competent to Establish the Quantum of Damage

A party to a case is not disabled, as perhaps he was under the long discarded common law rule,⁵ from offering his opinion as to the amount of damages. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 595 (10 Cir., 1962); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 473 (9 Cir., 1964) (dictum). Here, Mr. Urban was a man of long experience in the plumbing and heating industry, familiar with all phases of the work, and had operated in Alaska since 1947 (Tr. 177, 178). Contrary to Baker's assertion, Mr. Urban was at Clear during the course of the project there (Tr. 178, 197). He was in constant telephone communication with and reviewed memos from the job site

5. See McCormick, *Evidence* §65 at p. 142 (1954).

personnel (Tr. 178, 179). We submit this was ample qualification for him to testify as to his opinion of the damages his company incurred. The trial court's discretion controls as to the ability and qualification of an expert witness to throw light on the issue before the court with opinion testimony. *Standard Oil Co. v. Moore*, 251 F.2d 188, 221 (9 Cir., 1958), cert. den., 356 U.S. 975; *Congress & E. Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879). The usual evidentiary requirement of first-hand knowledge is not invariable; expert testimony often does not depend for its efficacy upon first-hand knowledge. *Congress & E. Spring Co. v. Edgar*, *supra*, 99 U.S. at 657. Nor are the foundation facts⁶ upon which Mr. Urban based his estimates susceptible to a hearsay objection. In the main, the estimates were based upon summaries of office records kept and utilized in the ordinary course of business (Tr. 144-145, 222, 237). Long ago, the Supreme Court declared in connection with price lists prepared from sources unavailable at trial for cross-examination:

“We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in *Wendell*. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury.” *Cliquot's Champagne*, 3 Wall 114, 141 (1866).

6. The requirement of adequate foundation facts is clearly enunciated in *Lessig, supra*, 327 F.2d, at p. 473.

And this court has ruled, even in the absence of the circumstantial guarantee of reliability induced by keeping records in the ordinary course of business, that:

“It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, insofar as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, whether the expert sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed.” *Standard Oil Company of Calif. v. Moore, supra*, 251 F.2d at p. 222.

Two additional considerations underpin the propriety of the District Court's decision to admit the evidence: This was a case tried to a judge well equipped to assess the probative value of the evidence offered; not to a lay jury unfamiliar with the relative trustworthiness of evidence. The second consideration is founded on necessity: In most instances, there was no way other than estimates to extrapolate a reasonable approximation of the damages assignable to the acceleration (Tr. 188). Acceptance of appellant's objections would mean that damages actually sustained could not be adduced by proof. As a practical matter, the man in charge of estimating and performing work for a large enterprise is the only one able to know and assemble costs of labor, cost of materials, freight, taxes, insurance, overhead, and

all of the other items of expense upon which the success of the business depends.

B. The Summaries Were Properly Admissible In Evidence and Opportunity Was Afforded for Examination of the Core Facts Used in Their Preparation.

“It is long established that, where records are voluminous, a summary, either oral or written, may be received in evidence.” *Sam Macri & Sons, Inc. v. U.S.A., infra*, 313 F.2d at 128-129.

Such summaries arguably raise questions of hearsay. But such objections evaporate where opportunity is afforded for examination of the core facts or source of the summaries. Opportunity for such an examination is all the law requires; whether the opportunity is exercised is immaterial. *Sam Macri & Sons, Inc. v. U.S.A., supra*, 313 F.2d at p. 129.

Here, the bulk of the evidence comprising the summaries in question was gone over in the deposition of John Way, Secretary-Treasurer of Urban. (Mr. Urban's deposition was taken at the same time and place.) This deposition was conducted in Urban's home office in Portland, Oregon, and all the materials were available for inspection by counsel for Baker (Tr. 206-207, Tr. 223). Much of this was available for inspection in the courtroom and could have been, but was not, utilized in cross-examination (Tr. 571). Significantly, the court's pretrial discovery order specifically provided for inspection of any and all records at Portland (R. 27-28) and Appellant nowhere asserted that all were not available to it. (The

trial court did require Appellant to produce certain basic records when it was shown that these had not been previously produced or made available to Urban (Tr. 561-564). The questioned Exhibit (JJ) was, however, admitted for illustrative purposes (Tr. 567)). In each instance where testimony based on summaries was offered, the source of such evidence was identified with particularity. In this state of the record, Baker's objections to the summaries are clearly without merit.

C. Damages Were Established With Reasonable Certainty.

Nowhere is appellant's invitation to this court to conduct a *de novo* proceeding or its misconception of the appellate function more apparent than in its, if we may take the liberty to so describe it, rambling review of the District Court's computation of damages. In major part, this review is a rehash of arguments three times presented before the District Court, at trial, in appellant's "Objections to Memorandum of Decision," and in the post-trial motions. Urged on appeal, these objections come too late.

As the Supreme Court said in *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555 (1931), the distinction between the fact of damage and the calculation of their extent must be kept ever in mind:

"[T]here is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."

Id. at p. 562. And see *Linen Thread Co. v. Shaw*, 9 F.2d 17, 19 (1st Cir., 1925). Although *Story* was not an action in contract, the rule applies to such actions as well. *Frank Sullivan Co. v. Midwest Sheet Metal Works*, 335 F.2d 33, 42 (8th Cir., 1964); *Standard Oil Company v. Perkins*, 347 F.2d 379, 386-387 (9th Cir., 1965).

We have pointed out to the court the evidence which shows an acceleration occurred and that this acceleration damaged Urban. Once this dual showing was made, the District Court had a large amount of discretion in determining the amount of its verdict. Cf. *Standard Oil Company v. Perkins*, *supra*, 347 F.2d at p. 387 (Jury verdict rather than case tried to the court). In *United States v. Smith*, 94 U.S. 214, 219 (1877), the Supreme Court declared this standard of review on appeal from a court of claims determination of damages for breach of contract:

“In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than a jury; but, like a jury, it must make its estimate from the proofs submitted. The result of the best judgment of the triers is all that the parties have any right to expect.”

Id. And see *Specialty Assembling & Packing Co., Inc., v. United States* (C. of Cls. Slip Opinion Jan. 21, 1966). This court does not sit as a cipherer, as Baker apparently would have it, to substitute its appraisal of the damage testimony for that of the District Court. It would be inconsistent with this court's function of deciding questions of law to review in detail the computation of dam-

ages. Moreover, there is no assurance that such a review would lead to a more just result. Mathematical errors, if any, may be corrected, as was done in this case, by appropriate post-trial motions to the District Court. The measure of damages in a case of this kind is the reasonable value of the extra work. *Continental Casualty Co. v. Schaefer*, *supra*; *Sam Macri & Sons v. United States*, *supra*. The record will be searched in vain for an instance where the standard of reasonableness was not observed, or where damage items in detail or total exceeded the limits of proof. In sum, we emphasize to the court the fact that Baker has not particularly questioned individual items of damage, but only the computation of their amount.⁷

The Contract Requirement That Extras Be Previously Agreed Upon in Writing Was Waived (Finding XIX).

Several times this court has noted that provisions of this type are for the protection of the parties for whom the work is done; they provide a means whereby the owner may remedy the trouble, thus avoiding the "surprise" of an unforeseen claim. *Macri v. United States*, 353 F.2d 804, 807 (9th Cir., 1965); *Sam Macri & Sons, Inc. v. United States*, *supra*, 313 F.2d at p. 128; *Continental Casualty Co. v. Schaefer*, *supra*, 173 F.2d at p. 8. Where this element of surprise is lacking, written notice is a useless thing and thus the cases recognize compliance with such a requirement may be waived. *Id.*

7. Nonetheless, references to the testimony pertaining to each item of damage in the acceleration claim is collected in the Appendix of this brief.

Here, Baker told Urban early in May, 1960, that additional costs should be submitted and Urban requested additional compensation (Tr. 423, 457, 468, Ex. 8, Ex. 9). Urban was told that it was behind schedule (p. 11, Dep. of McConigal Tr. 772, *et seq.*) and was told to "speed it up" (Tr. 444). Baker expected completion by September 15, 1960 (Tr. 657). In the construction business, particularly when, as here, time is of the essence, oral agreements or orders are often not formally executed in writing until after the work is completed or well under way. Baker's Project Supervisor, Bernardi, said with reference to "paperwork" on the job:

"[I]t was just one of those jobs that had to be done and they had to take a lot of short cuts to get the thing done." (Tr. 382) and he believed it fair to say:

"In fact, on this job, contrary to most jobs, verbal orders did go on lots of occasions. . . ." (Tr. 383).

Urban's foreman never received a written order during the course of the job. He proceeded on verbal directions on many occasions including a large number of changes which were undisputed (Tr. 58). The trial court fairly concluded the contract requirement that extras be previously agreed upon in writing was waived.

Extras Beyond the Scope of the Subcontract Were Performed by Urban and Substantial Evidence Supports the Award of Compensation.

Common to each of the disputed items is Baker's simplistic assertion that the work performed was "plumbers'

work” and thus within the scope of the contract requirement that Urban perform “all mechanical” work on 1302.

The argument assumes too much. Under its unlimited rationale, Baker could impose any and all burdens on Urban so long as the work was “plumbers’ work” and regardless of whether Baker itself created the necessity for such work and regardless of the detailed plans and specifications incorporated in the subcontract. Such is not the law. If by default of the prime contractor, the cost of materials and work provided for in a building contract has been increased, the subcontractor may recover the reasonable value of the additional work necessitated. 13 Am. Jur.2d, *Building Contracts*, §19 at p. 21-22 (1964). For:

“There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of the performance.”

Miller v. Othello Packers, 67 Wn.2d 829, 830-831 (1966). See *Lichter v. Mellon-Stuart*, 193 F. Supp. 216 (D.C., Pa., 1961). See also *Northeast Clackamas C. E. Co-op. v. Continental Cas. Co.*, 221 F.2d 329, 334 (9th Cir., 1955).

The limit of Urban’s obligations under the subcontract was fixed by the plans and specifications; to the extent that deviations from those plans occurred, the work thereby created was “extra” and subject to additional compensation. Such was the understanding of the parties to the contract as well (Tr. 286-287, 289, Tr. 652 (Baker)). Evidence as to each specific item of extras follows.

Before turning to those items, however, it is interesting to note that Appellant states it will treat with the evidence in the light most favorable to Urban and then proceeds to rely on the evidence of its own witnesses and argues that inferences favorable to it must prevail over the trial court's determination from all of the evidence. Nonetheless, the evidence supports each of the claims allowed.

Connection of Kitchen Equipment

The kitchen equipment, furnished by another subcontractor (Tr. 38), did not conform to the drawings furnished by Baker (Tr. 37, 94) nor to the "rough-in" plumbing installed in accordance with the contract drawings. Alterations and additions had to be done to make connections to the equipment when it arrived (Tr. 38, 41, Tr. 94). Baker ordered the hookup to be made (Tr. 39, 41), as is conceded by Appellant (App. Br. p. 55). Time sheets and material costs fairly reflecting the additional charges necessary were kept (Tr. 37, 41, 42, Tr. 94-95). The Court's award was in accord with this figure (Ex. 21), Finding VII(a)).

Connecting Waterlines and Drains to Refrigerator

The drains and waterlines required for the refrigeration equipment did not correspond with the contract drawings; new pipes had to be placed in the concrete when the equipment (furnished by *another* subcontractor) arrived at the job (Tr. 39-40; Tr. 93-94). Baker concedes that it requested the new drains and line be installed (App. Br.

p. 56). Costs were kept fairly reflecting the additional costs of connecting the equipment (Tr. 40-41, Tr. 94-95) (Ex. 19). This we submit, is ample basis for the court's award (Finding VII(b)).

Installation of Grease Interceptor Extensions

The grease interceptors as specified in the plans and specifications would not fit the job because of some large beams installed by Baker (Tr. 44, p. 7, Dep. of John Way). Alterations had to be made (Tr. 45) because field conditions prevented their installation. Someone, apparently connected with Baker, contacted Urban and told it to put the interceptors on (Tr. 45). Certainly, Baker knew of the problem. (Ex. U). Records were kept of the time spent on the job and were turned in to Urban (Tr. 45, see Ex. 16) and invoiced to Baker. These constituted the basis of the court's award (Finding VII(c)).

Repairing Water Main Leak

Two or three waterline leaks developed (Tr. 98) at the camp where workmen were lodged and it was understood that Baker expected Urban to fix them (Tr. 43, 118, 356-357). Beyond dispute, camp maintenance was Baker's responsibility (Tr. 356, 358) and these leaks occurred in connection with operation of the camp (Tr. 97-98). The cost breakdown for repairing the leaks is compiled in Exhibit 3 (Tr. 59-60) and the testimony is that the amount of damages as found by the court is a reasonable sum (Tr. 43) (Tr. 99-100) (Finding VII(d)).

Little need be said of Appellant's unsupported assertion that the District Court had no jurisdiction to decide this claim. The admitted facts demonstrate an adequate basis for diversity jurisdiction (R. 22-23, See R. 1 and 2). In any event, the well established doctrine of pendent jurisdiction is sufficient to sustain the District Court adjudication.

Though conventionally applied in the context where an unfair competition claim is joined with an action for patent infringement, the doctrine is not limited to such a situation. See, for example, *Murphy v. Kodz*, 351 F.2d 163, 166 (9 Cir., 1965). And here the nexus between the water leak claims and those concededly falling within Miller Act jurisdiction is ample to sustain the court's exercise of jurisdiction. See *Anno.*, Modern Status of Rules as to Pendent Federal Jurisdiction over Nonfederal Claims, 5 A.L.R.3d 1040 (1966).

We pass briefly on Baker's repeated contention that despite the validity of Urban's claims, it is barred by the contract requirement that there be a prior agreement in writing as to extras. Bluntly stated, Baker's argument is an Alice in Wonderland approach to the realities of job procedures employed at construction sites where formality usually yields to practicality. And Appellant's position is curiously inconsistent with the procedures it followed in actual practice. The facts show that Baker never sent a written order or directive for doing extra work. Most of this extra work was not in dispute here and there was never a problem concerning Urban's right to com-

pensation (Tr. 96-97, Tr. 58-59).⁸ Application of the principles governing waiver which we have discussed at some length in connection with the acceleration claim, clearly supports the Court's determination of waiver under the facts here.

Bond Premium and Alaska Business Tax Are Proper Items of Damage (Finding XV).

The trial court found, in accordance with the testimony, that it is usual and customary upon an award of extra claims on a construction contract to add the Alaska gross business tax and increased bond cost which automatically attach to the increase in contract price and gross receipts.

It is true that Baker agreed to bear the cost of Urban's performance bond and the trial court simply enforced that promise in its judgment. Urban will be liable for the premium and the taxes upon collection of the award and Baker will not be.

Alaska business tax and bond cost at 1¼% were itemized upon Exhibit 29 submitted prior to the trial in accordance with the pre-trial order and detailed upon all of the extra billings. They are a "standard and usual charge" (Tr. 218). Appellant's argument here is simply an afterthought questioning items all parties realized are additional expenses automatically incurred upon an award of additional costs and receipt of which is required to

8. See pretrial order of Feb. 18, 1963, p. 3 (R. 22), items 2, 3(a), (b), (c), (d), (e) and 4 wherein plaintiff conceded a \$12,000.00 deletion and defendant conceded at least six items of extra work totaling \$44,511.37, all without any previous order in writing.

make the recipient whole. Appellant did not raise this issue anywhere in its 40 page memorandum upon the motion for new trial (see Baker's memorandum in support of motion and Objection to Findings, R. 106-145) although it questioned virtually everything else. Error, if any, cannot be complained of for the first time on appeal. *Macri v. United States*, *supra*, 353 F.2d at p. 808.

The Award of Interest Was Proper Under the Undisputed Facts (Finding XVIII, See Ex. 31)

Baker's argument that interest was improperly allowed hinges on its unsupported assertion that the court found that Urban did not complete its performance under the subcontract until October of 1961, thus placing Baker's payments in April, October and November, 1961, within the contract requirement that "final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work." Baker nowhere questions the fact that \$104,896.37, at least had been earned and was due by January 1, 1961.

Finding V (R. 83), which is undisputed, clearly establishes that the work performed by Urban during October, 1961, was work constituting a modification to the contract ordered after completion of all of the contract work, payment for which also was not in dispute by the time of trial. Baker points to no evidence demonstrating otherwise. More vitally, Finding XVII (R. 89), which is also undisputed, shows that Urban completed all work under the subcontract by November 20, 1960. The facts show that Baker successively tendered four checks during 1961, each

"in final payment" for Urban's already completed performance under the subcontract. (Tr. 224-227, Ex. V, Ex. 18F, Ex. 18I, p. 15-19 McConigal Dep.). Interest was computed from January 1, 1961, to the date of tender on each of the liquidated sums Baker agreed was due (Tr. 227-228). Plainly enough, interest was forthcoming and was properly allowed on the items.

The Award of Attorney Fees Was Proper (Finding XX)

Urban prevailed upon all contested issues of fact except items 5 and 7, albeit not in the exact amount claimed. (See Pre-trial Order R. 23, 24.)

Baker's argument on this point rests entirely on the fact that Urban did not recover the full amount of each of the claims alleged in its complaint. This court's decision in *Macri & Sons v. United States*, *supra*, 313 F.2d 119, is cited as supporting authority for the argument.

Even ignoring that the award of attorney fees to the subcontractor was sustained in *Macri* and that the language appellant purportedly quoted from that decision is nowhere to be found in the official reports, yet another reason distinguishes the *Macri* situation from the case at hand. In *Macri* there was a counter-claim (designated a cross-complaint because the cause of action had been assigned) by the prime against the sub arising out of delay allegedly caused by the sub upon which an award was made.

A situation where there is a counter-claim is very different from one, as here, where only the liability and

amount of damage payable by the prime must be ascertained. In the counter-claim situation, there may be a basic and substantial dispute as to who is responsible for the damages on a particular project. In the situation at bar, it has never been contended that Urban is in any way responsible for any damages or liable to Baker. A party should not be put to the peril of proving damages exactly equal to his complaint in order to recover attorney fees. See *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964). In many cases, calculation of damages has subjective elements and cannot be calculated with precision.

The holding of *Macri v. United States*, *supra*, 353 F.2d 804 is more apposite to the situation at hand. There the court ruled that the District Court's discretion governs the award of attorney fees. The award at bar was authorized under Alaska law (Alaska Comp. Laws Anno., §55-11-51; Rule 82, Alaska Rules of Civil Procedure), and no abuse of discretion is shown.

Contrary to Appellant's Insinuations, the Trial Judge Conducted a Fair and Impartial Inquiry.

We would be remiss in our duty to uphold the integrity of the Court (Canons of Professional Ethics, 1 and 32) if we passed without mention Appellant's wholly gratuitous insinuation that the Trial Judge was guilty of misconduct or that his decisional faculties were somehow disrupted by the Alaska earthquake. (See App. Brief p. 66-67.) The record demonstrates that the trial proceeding leaves nothing to be desired in the way of fairness or

competency on the part of the able District Judge. Prior to entry of judgment, the Court entered a memorandum of decision explaining the basis of its action (R. 71-76). In fact, on several items of damage, the Court upon its independent review of the evidence reduced Urban's recoveries (R. 74-75). Again, on Baker's post trial motions, the Court rendered a new memorandum of decision (R. 164-165). The Court again reviewed the evidence and went to some pains in stressing the role credibility played in its determination. The Court noted that it was "impressed by and believed the testimony given by Mr. Urban" (R. 165), Urban's key witness on the damage issue.

We have not taken the drastic step of moving to strike Appellant's brief in the interest of expediting final determination of this appeal. See *Kellogg v. Wilcox*, 283 P.2d 677 (Wash. 1955).

Motion for Costs of Printing Briefs and Attorney Fees on Appeal.

Appellee does, however, pray for an award of attorney's fees to be fixed by the court upon this appeal together with the actual costs thereof to be taxed by the clerk.

State law governs whether attorney's fees will be allowed in a Miller Act proceeding, *United States for Brady Floor Covering, Inc. v. Breeden*, 110 F. Supp. 713 (D.C. Alaska 1953); *United States v. Elwin*, 219 F. Supp. 418 (D.C. Alaska 1961); *Sam Macri & Sons, Inc. v. U.S.A.*, *supra*, 313 F.2d at p. 130.

A.S. 09.60.010 provides:

“Except as otherwise provided by statute, the Supreme Court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.”

And Rule 54(d) F.R. Civ. P. provides in pertinent part:

“Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .”

Where attorney fees are allowed as costs pursuant to statute, the award may embrace attorney fees on appeal as well. See *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F.2d 622, 626 (9th Cir. 1952). See also *Boyd Callan, Inc. v. United States*, 328 F.2d 505, 511-512 (5th Cir. 1964) (semble). Alternative authority for the same result stems from the provisions of 28 U.S.C. §1912. See *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800, 802 (9th Cir. 1949).

CONCLUSION

The judgment of the District Court was right and should be affirmed, together with costs and an attorney's fee to Appellee.

Respectfully submitted,

DONALD McL. DAVIDSON
WILLIAM B. MOORE
of FERGUSON & BURDELL,
Attorneys for Appellee,
929 Logan Bldg., Seattle, Wash.
MA 2-1711

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

DONALD McL. DAVIDSON

WILLIAM B. MOORE

Attorneys for Appellee

APPENDIX

Some references of direct testimony to detailed items of cost and their manner of calculation which underlie the court's award of \$80,519.24 for the acceleration follows:

Total \$80,519.24

Brewer's first submittal (assuming overtime Tr. 108) Ex. 8 of May 21, 1960—\$78,379.23.

Brewer's second submittal (excluding premium pay, Tr. 108) Ex. 9, prior to June 1, 1960.—\$48,470.78.

Fred Urban estimate (after job based on actual time cards and invoices, Tr. 218), \$135,226.16, Ex. 29.

Labor Costs Only.....(\$30,389.40 allowed)

Actual excess labor costs alone were between \$90,000.00 and \$100,000.00 (Tr. 191).

Method of computing costs is that used in negotiating with the Corps of Engineers and for estimating jobs generally (Tr. 195).

There is no method of precisely calculating labor inefficiency or lost time on a minute by minute basis and estimating techniques must be used (Tr. 188).

The method used was the same method used for bidding the job (Tr. 189). Costs were (Ex. 29) \$54,468.86.

*Increased Cost of Small
Tools and Equipment*..... \$4,972.22 allowed

2½% of labor cost is Urban's standard method of estimating small tool costs and it is checked against and verified by company experience (Tr. 198).

Urban is obligated to furnish tools to new employees, a complete set of which costs \$450.00 (Tr. 198).

About 18 additional men were required for the acceleration (Tr. 214).

Four (4) more welders were required and the usual and standard going rate is \$170.00 per month for each (Tr. 200-201), two extra welders being rented at the job site from others (Tr. 116).

A Volkswagen, six-passenger truck had to be sent to the job because of the additional men required (Tr. 116) and \$225.00 monthly rental is the rate paid for that type of equipment (Tr. 201).

Extra equipment necessarily used extra gas and oil and all of the equipment was subjected to extra usage causing extra wear and tear and maintenance costs necessarily requiring an estimate (Tr. 201).

Total cost including specifically known and estimated items was \$8,527.35 (Tr. 202).

Special Shipment Costs.... \$3,043.31 allowed

Tabulation of invoices for air freight and special trans-continental trucking (Tr. 208) \$4,349.81 excluding normal freight bills (Tr. 209).

Labor Double

Time Costs \$5,833.40 allowed

Based upon payroll reports (Tr. 212) of actual hours on Sundays and holidays (Tr. 213) over and beyond a 54-hour week (Tr. 214) being only a small portion of the 1551 overtime hours verified by defendant's auditor (Tr.

144, Tr. 213), Ex. 29, \$8,129.63.

*Mobilization and Transportation
of Additional Plumbers \$2,499.12 Allowed*

A man's pay started when he left the union hall in Fairbanks and Urban also paid for his air travel (Tr. 117) including cab fare. Air fare was charged at actual cost together with actual travel pay required on an estimated additional 18 men (Tr. 214) plus normal turnover of the additional employees (Tr. 215). \$2,499.12.

Increased Camp Costs at \$12.00 Per Man Day

1050 man days at \$12.00
or \$12,600.00 allowed.

Actual extra man days 2850 $\frac{1}{2}$	
at \$12.00	\$34,206.00

Estimated due to acceleration,	
1050 at \$12.00	\$12,600.00

In summary, upon specific items the Trial Court allowed two items in the amount claimed, one for one-third of the actual extra cost of labor and another for air fare and travel pay substantially supported by invoices actually paid. The Trial Court awarded approximately one-third of the actual excess labor cost and about three-fifths of the amount claimed upon a combined estimating and time card basis.

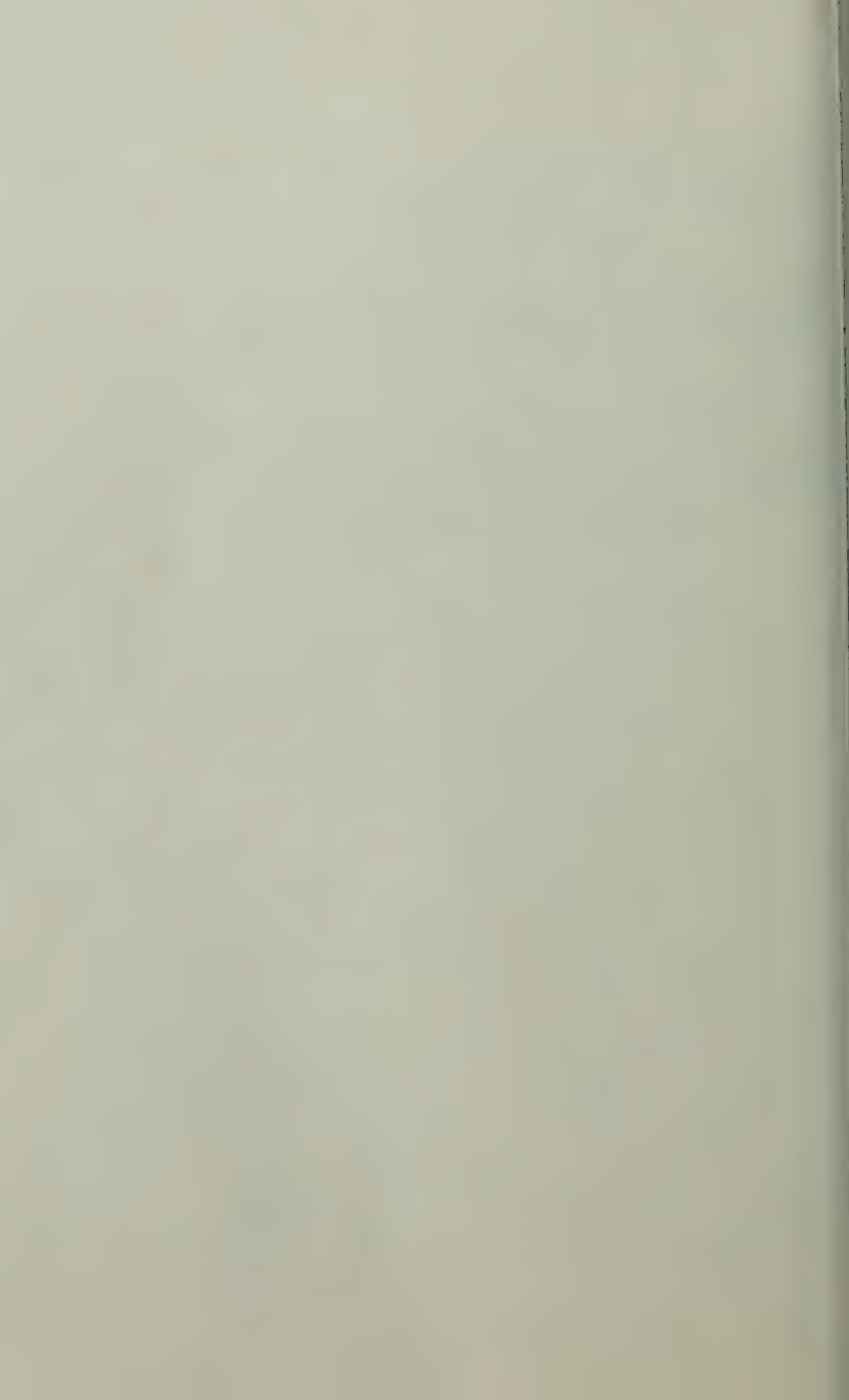
Machinery and small tool costs were allowed at about five-eighths of the amount claimed, the court apparently disregarding estimated items such as wear and tear and extra gas and oil.

Some invoices for special shipment were not allowed although almost three-fourths were recognized.

Finally, it should be pointed out that the Court's findings were that the proof showed "at least" (Finding XVI, R. 88) the amount of each item and that:

'The fair and reasonable value of the extra work required of this plaintiff in accelerating the work *was not less than* \$80,519.24" [emphasis supplied, Finding XIII, R. 87].

In every instance of damage, by item or total, the Trial Court evaluated the evidence and would have been justified in a far larger award, which would not even then have reimbursed plaintiff for its actual cost.



No. 20384

**IN THE
United States Court of Appeals
For the Ninth Circuit**

BAKER & FORD Co., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

REPLY BRIEF OF APPELLANTS

MIKE STEPOVICH
Attorney at Law
Fairbanks, Alaska

BRUCE T. RINKER
317 Bellingham Nat'l Bank Bldg.,
Bellingham, Wash.

Attorneys for Appellants

W.M. B. LUCK, CLERK

SUBJECT INDEX

	<i>Page</i>
Argument in Reply	1
Connection of Kitchen Equipment.....	15
Connecting Water Lines and Drains to Refrigerators	16
Installation of Grease Interceptor Extensions.....	16
Repairing Water Main Leaks.....	17
Conclusion	20
Certificate of Compliance.....	21

TABLE OF CASES

<i>Brown & Root, Inc., v. Gifford Hill & Company,</i> 319 F.2d 65 (CA 5 La., 1963).....	18
<i>Macri & Sons v. U.S.,</i> 313 F.2d 119 (9th CA, 1963).....	19
<i>Standard Oil Company of California v. Moore,</i> 251 F.2d 222	11
<i>USA for General Electric Company v. Brown</i> <i>Electric Company,</i> 168 F. Supp. 806 (DC Va. 1959)	19
<i>U.S. Use of Flow Engineering, Inc. v. Continental</i> <i>Casualty Co.,</i> 195 F. Supp. 177 (DC N.J., 1961)....	18

ANNOTATIONS, STATUTES AND TEXTBOOKS

5 A.L.R.3d 1040	18
1 Jones on Evidence 472.....	13
28 USC §1732a	11

ARGUMENT IN REPLY

The counter-statement of the case contains certain recitations and arguments which are not supported by the evidence:

On page 4 it is argued that Baker knew the contract would be accelerated "and that additional money was available as compensation for the speed up as early as April 8, 1960." The testimony of Mr. Bernardi there referred to, merely is to the effect that discussions had been held all along in an attempt to determine the earliest possible completion dates. The evidence is clear that the last agreed-to dates were not specifically discussed until April 27th (Baker, Tr. 614-617; Bernardi, 503). This is supported by reference to Exhibit 41 dated April 28th which is an authorization to the Corps of Engineers for additional expenditures and Exhibit 25 dated April 29th being a letter from the Corps of Engineers, and Exhibit W dated April 29th being a telegram from the Corps of Engineers confirming the conversation of April 27th. It should also be pointed out with reference to the assertions in that paragraph that Mr. Baker's request for a cost proposal was based on final contract completion date of September 15th (Tr. 619-20, 640-41, 655-57). This testimony is undisputed.

The statement on page 5 that Baker gave every indication during physical construction that Urban would be compensated was not supported by the cited testimony.

On page 5 there appears the further statement:

"At this point, of course, under the terms of the subcontract, the completion dates binding Baker became equally binding on Urban. (Ex. H; Tr. 427, 429, 431, 432)."

We find this same assertion being made on pages 10, 11 and 14 of the argument. Whether Urban was bound by new negotiated dates is a legal determination to be made from the contract between the parties (Ex. H). The undertaking in this regard is set out in the subcontract, it, reading as follows:

“THE SUBCONTRACTOR AGREES:

“(a) To assume toward the CONTRACTOR, so far as the SUB-CONTRACT work is concerned, all the obligations and responsibilities which the CONTRACTOR *assumed* toward the OWNER by the MAIN CONTRACT which includes the general and special conditions thereof, and the plans and specifications and addenda, and all modifications thereof incorporated in the documents *before their execution* (which documents shall be available to the SUBCONTRACTOR). The SUBCONTRACTOR agrees not to assign or sublet said work or any portion thereof without the written consent of the CONTRACTOR.

“(b) To start work immediately when notified by the CONTRACTOR, and to complete the several portions and the whole of the work herein sublet, at such times as will enable the CONTRACTOR to fully comply with the contract with the OWNER, and to be bound by any provisions in the MAIN CONTRACT with the OWNER for liquidated damages, *if caused by SUBCONTRACTOR.*” (Italics ours)

It becomes apparent from the foregoing that the subcontractor, and naturally so, is only bound by the main contract as of the time of its execution, and any subsequent modifications thereto would have to be agreed upon by the prime and subcontractor just as they would have to be agreed upon as between the prime and the owner in the first instance. And the assertion in appellee’s argu-

ment (P. 14) that it could have been liable for liquidated damages must fall in the light of the language of paragraph (b) above quoted, its only obligation being to comply with the main contract as executed.

Appellee cites no law in support of its statement that Urban was bound by the modification but in each instance refers to Tr. 427, 429, 431 and 432 to support its position. A reference to those pages of the transcript indicates that this was merely a legal opinion elicited after considerable urging from Mr. Bernardi, a civil engineer.

All of Urban's witnesses testified that no directives respecting acceleration were give to Urban by Baker and Ford, these references being indexed in appellants' original brief. However, to support their contention that some directives were given we find appellee repeatedly stating that Baker told Urban "to figure the job done by September 15, (Tr. 657) and to 'get the thing speeded up' (Tr. 444; see also p. 11, McGonigal deposition at Tr. 773 *et seq.*," This reference appears in the counter statement at page 5 and in the argument at pages 10, 11, 14, 15 and 24.

The assertion that Mr. Baker told Urban "to figure all the job completed by September 15 . . . (Tr. 657)" is a complete misstatement of the testimony. The testimony appearing at Tr. 656-57 relates to Mr. Baker's request from Mr. Brewer for a cost figure based on a September 15th completion date. The specific question and answer on cross-examination follow(Tr. 657):

"Q. Was it possible, then, that you told him, Mr. Brew-

er, to figure the costs of completing all of the outside work by September 15th?

"A. I did. I told him to figure all the job completed by September 15th which date included all the outside work."

The further reference that they were instructed to "get the thing speeded up" appears in the testimony of Mr. Bernardi. A reading of that testimony clearly indicates that this language was used in the day-to-day operations with particular reference to maintaining current schedules and not with any reference to the overall schedule. The questions and answers on cross-examination follow (Tr. 444):

"Q. Was Urban Plumbing & Heating Co. behind on this job?

"A. My personal opinion is yes.

"Q. And what did you do about it?

"A. I kept talking to them.

"Q. What did you keep telling them to do?

"A. I told them, 'Let's get the thing speeded up, let's get on with the work here.'

"Q. Then you did tell Urban more than once to speed up their work?

"A. I told them, 'Let's get it done.' I didn't tell them to speed it up in the sense you are making it.

"Q. Did you say such words as 'speed-up'?

"A. Sure. You tell everybody on the job to speed up.

"Q. And how did you expect them to accomplish that?

"A. Well I think with a little planning and with a little prefabrication. We didn't have any problem with the other contractors, sir."

The same is true of the statements attributed to Mr. McGonigal in his deposition at Tr. 773, p. 11.

On page 9 of appellee's brief the assertion is made that "appellee finds no argument as to Specifications of Error III, IV, V and VI." The court's attention is called to the fact that at pages 13 and 14 of appellants' brief, it is pointed out where the arguments respecting these Specifications of Error are to be found and the reasons therefor.

Referring to appellee's argument that an acceleration occurred, there appears the assertion at the top of page 10 that the dates established by Mod. 6 (December 15th final completion) "were a reasonable forecast of the *minimum time* necessary to complete work under 1302 *at a price fairly within the responsibilities of the parties* under the contract as originally written." (*Italics ours*) In support of that statement appellee cites Tr. 731, 392, 397, 400, Ex. 38, Finding VIII (R. 85). None of these references support this argument.

Tr. 731 makes no reference to his subject matter. Tr. 392, 397-8 and 400 relate to the testimony of Mr. Bernardi and on all of the referred pages he states that the Mod. 6 schedule fixed "outside dates," giving a margin, and he then fixed it at a 30-day margin. Likewise at Tr. 431 he testified that Mod. 6 was a "very lenient" schedule.

Neither does Finding VIII support this statement and Ex. 38 cited and relied on by appellee was not offered in evidence.

At page 12 of appellee's brief it is argued that various items of increased costs were included in a cost proposal from Baker & Ford to the Corps of Engineers. Mr. Bernardi's testimony (Tr. 405-410) clearly shows that the recitation of cost items in Baker & Ford's proposal was a fiction, the compensation actually being for furnishing additional camp facilities and an early evacuation of the warehouse; further, that the matter of allocation or substantiation was a function of the Corps of Engineers that Baker & Ford were not concerned with.

It is stated on page 12 of appellee's brief that "examples of loss of efficiency and resultant increased cost were cited to the court (Tr. 54)" and that "longer working hours were necessitated thereby causing doubletime wage rates and raising overall labor costs (Tr. 60-62)." A reference to page 54 of the transcript indicates that Mr. Martindale was referring to time loss occasioned by what he felt was poor day-to-day planning, not because of any acceleration, and pages 60-62 of the transcript which appellee relies on, do not "demonstrate that longer hours were necessitated thereby causing double time wage rates," Mr. Martindale merely stating that the labor hours did "run more because of the manner of doing this job." In this connection, it is interesting to note that Mr. Martindale also testified that they were required to work Sunday only on two or three occasions and in those instances with only three or four men, not a full crew (Tr. 68); further, that the difficulties encountered on this particular job were no greater than usual (Tr. 69-70).

It is true as stated on page 12 there was testimony (Tr. 116) that additional tools and equipment were required, however, there is no specification by anyone in a position to know, what these consisted of. Mr. Urban was permitted to discuss this subject but his information was neither taken from the books and records of the company nor did he have any personal knowledge. The same is true of the air freight charges which the court allowed, Mr. Urban testifying that these were furnished to him by Mr. Way, his office man, with Urban having no personal knowledge.

On pages 13 to 16 appears appellee's argument as to whether this was a voluntary undertaking on Urban's part. We reassert that Urban's undertakings to meet the Baker & Ford proposed schedule (Ex. 1) was completely voluntary. This is clearly supported by the fact that no directives were ever given to Urban by Baker and Ford personnel; there was no legal liability under the terms of the subcontract to meet a different schedule; *and the testimony of Mr. Martindale that he was advised by Baker and Ford personnel "if we could make it, fine, and if we couldn't we didn't have to."* (Referring to the scheduled completion dates) (Tr. 72-74)

Much is attempted to be made on pages 4 and 14 of the proposition that the posting of Exhibit I, the Baker & Ford working schedule, was close or "sumultaneous with" the change of construction schedule, Mod. 11. We fail to discern the point involved and are unable to determine what difference this would make even if it were true.

The fact is, however, that the schedule (Ex. I) was prepared April 8th and issued April 22nd (Tr. 64, 166, 338-9) and the first concrete discussions relating to the finally agreed upon dates were held April 27th (Tr. 503, 614-15, 618-19), and these final dates were adopted by the Corps of Engineers on April 29th (Tr. 618). The assertion appearing at page 16 that Urban knew of the existence of Mod. 11 and its terms, excepting the consideration, is not supported by any of the evidence. Mr. Brewer testified that he never knew of a speed up until February of 1961 (Tr. 110, 112, 125-26). Mr. Urban stated that he was "surprised" to learn of it in February 1961 (Tr. 274).

Appellant has asserted throughout that Mr. Urban's testimony as to the question of damage and the quantum was incompetent, his opinion not being in response to a hypothetical question and he having no knowledge of the facts. Appellee in its answering brief has simplified this issue for us. It states on page 17, "Contrary to Baker's assertion, Mr. Urban was at Clear during the course of the project there (Tr. 178, 197). He was in constant telephone communication with and reviewed memos from the job site personnel (Tr. 178, 179). *We submit this was ample qualification for him to testify as to his opinion of the damages his company incurred.*" (Italics ours). Reference to the cited testimony follows (Tr. 178, 179):

"Q. Were you at Clear during the course of this project?

"A. Yes. I made visits to Clear.

"Q. Who did you confer with on this job?

"A. With Bob Brewer mostly.

"Q. Did you confer with him on the telephone?

"A. Quite often.

(Tr. 197):

"Q. And you were down at Clear yourself I take it?

"A. Yes, and talked to the men on the job and everything."

It is to be noted from this testimony that there is no showing that Mr. Urban was at Clear during the period involved in this litigation, i.e. May 1st, 1960 to November 20th, 1960. This was not gone into by appellee because the fact is that he was not at Clear during that period of time as disclosed by the following testimony (Tr. 260):

"Q. Could you please just answer the question. Were you in Fairbanks or at Clear at this particular time which you have here in Schedule 7, when these 18 plane fares and these 18 taxi fares, and the travel pay and subsistence, and the 50% turnover—were you here at that time?

"A. They were not all at one time, at one and the same time. They were over a period of time. I couldn't be here every time. I don't even know if I was here once.

"Q. You don't even know if you were here once?

"A. No.

"Q. Was this taken from May until the end of the job?

"A. That is correct.

"Q. I take it you consider this a fair estimate, but you weren't here at any time during it?

"A. That's a fair estimate, and also, if I recall right, I also confirmed with Mr. Brewer that we had about

that much increase in manpower.”

Neither was he in “constant telephone communication” with Clear under the first quoted testimony above and the testimony does not disclose that he had “reviewed memos from the job site personnel.” Appellee’s attempt to qualify Mr. Urban to testify as to his opinion based on this state of the record must fall short of the requirements of the law of evidence as set forth in our opening brief.

On page 18 it is also asserted by appellee that “In the main, the estimates (of Mr. Urban) were based upon summaries of office records kept and utilized in the ordinary course of business (Tr. 144-145, 222, 237).” Analysis of the cited testimony indicates that it falls short of the legal requirements for office records or summaries thereof. Tr. 144-145 merely had reference to the *total* hours on the job (Ex. Z). No opinion evidence of Mr. Urban with respect to the question of damages or quantum relates to this exhibit. Tr. 222 merely relates to questions regarding total direct labor charges, which was not answered by the witness, the court sustaining an objection based on the fact that the elicited answer would be based on hearsay and did not come within the business records rule.

At Tr. 237 Mr. Urban was being interrogated with respect to schedule 1 of Exhibit 29:

“Q. Now, where did those figures come from?”

“A. Those figures were figures that I made up from experience, and it is our method used quite often

in estimating and in negotiations with the Army Engineers in settling change orders.

"Q. All right now. Where did those figures come from? Who?

"A. I made these figures.

"Q. You made these figures yourself?

"A. Yes.

"Q. All right. Where did they come from? Just from your own head, is that it?

"A. Well, I — —"

(Interruption, and then the questioning proceeded to a different subject). So, here again we find the issues simplified by appellee's reliance on the three cited portions of the transcript to establish that all of the opinion evidence relating to the 8 schedules and summary of Exhibit 29 were "based upon summaries of the office records kept and utilized in the ordinary course of business." As shown above the first two cited references have no relation to the summaries and the last certainly does not lay a foundation for any of the requirements under the Business Records Act, 28 USC §1732a. It is most apparent that the so-called sources of information, whatever they may be, were not described and in the absence of such foundation can not be presumed to be sufficiently reliable to warrant reception of Mr. Urban's opinion evidence under the rule stated in *Standard Oil Company of California v. Moore*, 251 F.2d at page 222 cited in appellee's brief, page 19.

Two depositions of John Way and Mr. Urban are re-

ferred to on page 20 of appellee's brief together with the statement that "all materials were available for inspection by counsel for Baker" (presumably at Portland), "Much of this material was available for inspection in the courtroom" and that "appellant nowhere asserted that all were not available to it." Neither Mr. Way nor Mr. Urban's deposition was published or read into the record, and consequently, they are not a part of the record in this case. It is true that at Tr. 205-6-7 appellee's counsel states that all Urban's records were made available, however, that statement merely has reference to the records relating to the temporary sewer line, schedule 3, Exhibit 29. There was no showing whatsoever of what records were available during any depositions or at the time of trial, (Tr. 571-72) and to refute appellee's statement that we at no time claimed that all of the records were not available to appellant, we quote the following colloquy (Tr. 571-72):

"MR. RINKER: Your Honor, this as I say, is a business record. I would like to call the Court's attention to plaintiff's Exhibit 29, which consisted of all the schedules, in which was a listing of alleged expenses incurred in connection with air freight, rentals of equipment, and all of those things, and in no instance was there ever any invoice presented to us for our examination.

"THE COURT: My understanding yesterday, whenever that came up, was that those were among the records that were made available to you for your inspection when you made your inspection at Portland.

"MR. RINKER: No, they were not available for our inspection at Portland.

"MR. DAVIDSON: They are on the desk here in the courtroom, if he wants to look at them now.¹

"MR. RINKER: The gas, welding, rental invoices, none of those things were available. The gas and oil, maintenance invoices, there were simply no invoices of any kind.

"MR. DAVIDSON: That's quite true.

"THE COURT: That objection wasn't raised. It wasn't brought to my attention yesterday, because when this came up it was my understanding that those were, in fact I inquired of Mr. Davidson if those were among the records that were available when you inspected them in Portland.

"MR. RINKER: That was that one schedule, I believe, Your Honor.²

The language in Jones on Evidence, Volume 1, 244, p. 472, is instructive in this regard,

"To the application of this rule (summaries) it is essential that the original records or items be first duly identified and that a sufficient foundation be laid so as to entitle the records or writings themselves to be admitted in evidence. Also the admissibility of the records themselves as evidence must be established and they must be available to the opposite party for cross-examination."

Appellee's argument seems to be that because depositions were taken in Urban's office and because books and records were available in that office it was incumbent upon appellant to anticipate what summaries would be presented at the time of trial and to acquaint themselves fully with all books and records. The speciousness of this argument does not justify further response. The rule is well established as set forth by the court at page 575.

1. This reference is to Schedule 3 which is not at issue in this appeal.

2. Relating to Schedule 3 which is not at issue in this appeal.

576 and 577 of the transcript that the original records must be identified and must be available for cross-examination. In fact, based on that rule, the trial court would not permit appellant to introduce into evidence a summary, Exhibit JJ, until they produced the original records from which the summary was made, necessitating a special trip to Bellingham and return to Fairbanks during the course of the trial.³ Patently, we have as to all of Exhibit 29 and Mr. Urban's testimony in support thereof, the admission of summaries without any identification, qualification or production of the records from which the summaries were made.

With respect to damages, it is apparent throughout appellee's argument and the court's memorandum decision and findings, that they have approached this entire matter from the point of view that if appellant received consideration for a modification to the extent of \$146,000.00, the appellee is *ipso facto* entitled to a certain portion thereof. This, notwithstanding both appellee and the trial court recognize that the contract between the parties hereto is separate and apart from the main contract and if there is a modification of the subcontract the compensation therefor is based on quantum merit irrespective of what, if any, consideration passed under the main contract.

As to whether there was a waiver of the contract requirement that extras be previously agreed upon in writing, we agree with the quoted testimony on page 24 that

3. The court did admit the exhibit first (Tr. 576) but then reversed itself (Tr. 578) and rejected it until the original records were made available.

verbal orders were given throughout the course of the job, however, there is no showing that any verbal *change orders* were given on this job during the course of construction. The only orders for extras referred to by appellee (Tr. 58) were for trailer camps and barracks which were temporary work and not a part of this contract (Tr. 118-120).

Connection of Kitchen Equipment (Appellee's Brief, 26)

Appellee states that "time sheets and material costs fairly reflecting the additional changes necessary were kept (Tr. 37, 41, 42, Tr. 94-95). The court's award was in accord with this figure (Ex. 21, Finding VII(a))".

Reference to Tr. 37 shows that the time sheets, Exhibit 21, were not identified. Mr. Martindale was merely asked whether he kept time and whether the sheets kept accurately reflected the time he kept for the work to which his answer was in the affirmative. Exhibit 21 was never referred to.

The transcript reference to pages 41 and 42, relates to the next subject, refrigeration equipment, not the instant subject.

With respect to the next reference, Tr. 94-95, Mr. Brewer was directed to Exhibit 21 as well as Exhibit 19 (relating to refrigeration equipment) and the only substantive evidence respecting Exhibit 21 was as follows:

"Q. Do these invoices and time sheets represent additional costs in connecting the kitchen equipment and drains for the refrigeration equipment?

"A. Yes. To the best of my knowledge they do. There

is possibly a portion of this in here for moving the kitchen equipment into place which was outside the scope of our contract."

The court gave judgment for the amount set forth in Exhibit 21. It is obvious that includes extra work outside of the contract. Neither is there a showing of any knowledge on the part of Mr. Brewer of what was done or required in this regard.

**Connecting Water Lines and Drains to Refrigerators
(Appellee's Brief, 26)**

Appellant stands corrected insofar as its opening brief is concerned. It appears that Exhibit 19 was identified by Mr. Martindale for Urban as fairly reflecting the costs, however, this obviously was not "extra work" under the contract.

Installation of Grease Interceptor Extensions (Appellee's Brief, 27)

The statements in appellee's brief herein are completely without foundation under the evidence. The first sentence relies for its support on Tr. 44 and page 7, deposition of John Way. This is the second reference in appellee's brief to the deposition of John Way. This deposition was not read into the record or published and is not a part thereof and the testimony at Tr. 44 merely indicates that there may have been a faulty design by the architect requiring some fitting.

Appellee refers to testimony at Tr. 45 and concludes that "someone apparently connected with Baker, contacted Urban and told it to put the interceptors on." This is an inference completely unsupported by that reference,

it reading as follows (Mr. Martindale testifying):

"Q. Now, did you have any discussion with anybody about this problem of the grease interceptors and what to do about it?

"A. No. I was sent that information from Portland, from Urban Plumbing & Heating's office in Portland, that someone had contacted them and they would have to put them on, so they sent them up and we put them on."

The next reference in appellee's brief is "certainly, Baker & Ford knew of the problem, (Ex. U)." Reference to Exhibit U indicates that it is a letter written by Baker & Ford to Urban in November 1961, one year after the job was completed, rejecting the billing tendered by Urban.

Appellee then goes on to say, "records were kept of the time spent on the job and were turned into Urban (Tr. 45, see Ex. 16) and invoiced to Baker. These constituted the basis of the court's award (Finding VII(c))." As to this, testimony at Tr. 45 merely is to the effect that a record of time was kept and turned into Urban by Martindale. This record was never produced or offered. Exhibit 16 is an invoice to Urban from Peerless Pacific Company for what we do not know. This invoice was admitted as part of the pretrial proceedings but was never identified or referred to in the record. It is also interesting to note that the amount thereof is \$1,476.90 whereas the court's award (Finding VII(c)) was in the sum of \$2559.00.

Repairing Water Main Leaks (Appellee's Brief, 27)

This subject requires little amplification above that in our opening brief.

However, with respect to jurisdiction we should point out the following: On page 28 appellee states "the admitted facts demonstrate an adequate basis for diversity jurisdiction (R. 22-23, see R 1 & 2)." R. 22 and 23 refer to the pretrial order and R 1 and 2 refer to the original complaint. These were superceded by supplemental complaint (R. 33-38) and answer to supplemental complaint (R. 41-42) wherein the jurisdictional question became an issue per the court's order (R. 39-40).

The court found (Finding VII(d)) that judgment could run only against Baker & Ford as to this item it not having jurisdiction under the Miller Act but asserting ancillary jurisdiction (R. 91), because this work was separate and apart from Contract 1302, it being a part of Contract 1282, with which Urban was not involved (Tr. 499). The finding is fatal in three regards:

(a) The amount \$2586.00, is not sufficient to give the court jurisdiction even though there be a diversity of citizenship, 28 USC 1331.

(b) This cause of action is in no wise ancillary or supplemental to the principal cause. 54 Am. Jur., United States Courts, paragraph 32.

(c) It does not fall within the doctrine of pendent jurisdiction as asserted in appellee's brief. Nor do the authorities at 5 A.L.R.3rd 1040 quoted in appellee's brief support jurisdiction. See *U. S. Use of Flow Engineering Inc. v. Continental Casualty Company* (1961) (DC NJ) 195 F. Supp. 177. The other cited case therein, *Brown & Root, Inc. v. Gifford Hill & Company*, (1963, CA 5 La.) 319 F.2d 65 merely holds that if the Miller Act

claim is not unsubstantial or not frivolous but for some reason does not come within the Miller Act, the court may proceed to adjudicate it. This particular claim very clearly was never a part of Contract 1302 thus within the Miller Act and was never claimed to be by the appellee.

With respect to appellee's argument as to interest appearing on page 30, we would point out that the trial court, in Finding V (R. 83) determined that the contract was still open and in effect during October 1961, else how could there be a modification thereto, and in Finding VI (R. 84) determined that final settlement had not been made thereof as of February 21, 1963, if at all. Therefore, it becomes apparent that Urban's work under the sub-contract was not completed until October 1961 and,

"Final payment shall be made within a reasonable time after the completion and acceptance of the sub-contract work . . ." (Ex. H)

and interest therefore should not have been computed from a date earlier than November 16th, 1961.

With respect to the subject of attorney fees, page 33 appellee's brief, it is correct in stating that the quoted language appearing on the bottom of that page does not appear in *Macri & Sons v. U. S.*, 313 F.2d 119 (9th CA 1963), erroneously cited. The correct citation is *USA for General Electric Company v. Brown Electric Company*, (DC Va. 1959) 168 F. Supp. 806.

At page 32, appellee's brief, it assumes an accusatory role with respect to appellants for "appellant's wholly gratuitous insinuation that the trial judge was guilty of misconduct or that his decisional faculties were somehow

disrupted by the Alaska earthquake.” This language is appellee’s, not appellant’s. Appellant’s assertion throughout has been that the trial court erred substantially in its memorandum decision, which it ultimately partially corrected; and that it then entered findings which did not even conform to its corrected memorandum decision; and that it erred in its treatment of the evidence adduced on behalf of appellee. We are not confronted in this case with a question of credibility of the witnesses for we find no substantial conflict therein. The question posed to the trial court and this court on review is the legal sufficiency of the evidence to support the findings and conclusions. We submit that on the basis of the detailed analysis of that testimony, appellee fell far short of sustaining its burden.

Appellants at no time have asserted “misconduct” on the part of the trial court. Appellants have and do insist that the trial court committed substantial error which, of course, is a prerequisite to appellant’s right to have this record reviewed. If our attempt to rationalize or explain the erroneous and inconsistent treatment of the evidence was in any wise injudicious, we certainly apologize to all concerned, including able counsel for appellee.

CONCLUSION

The judgment of the district court should be reversed and appellee’s action dismissed as originally prayed for herein.

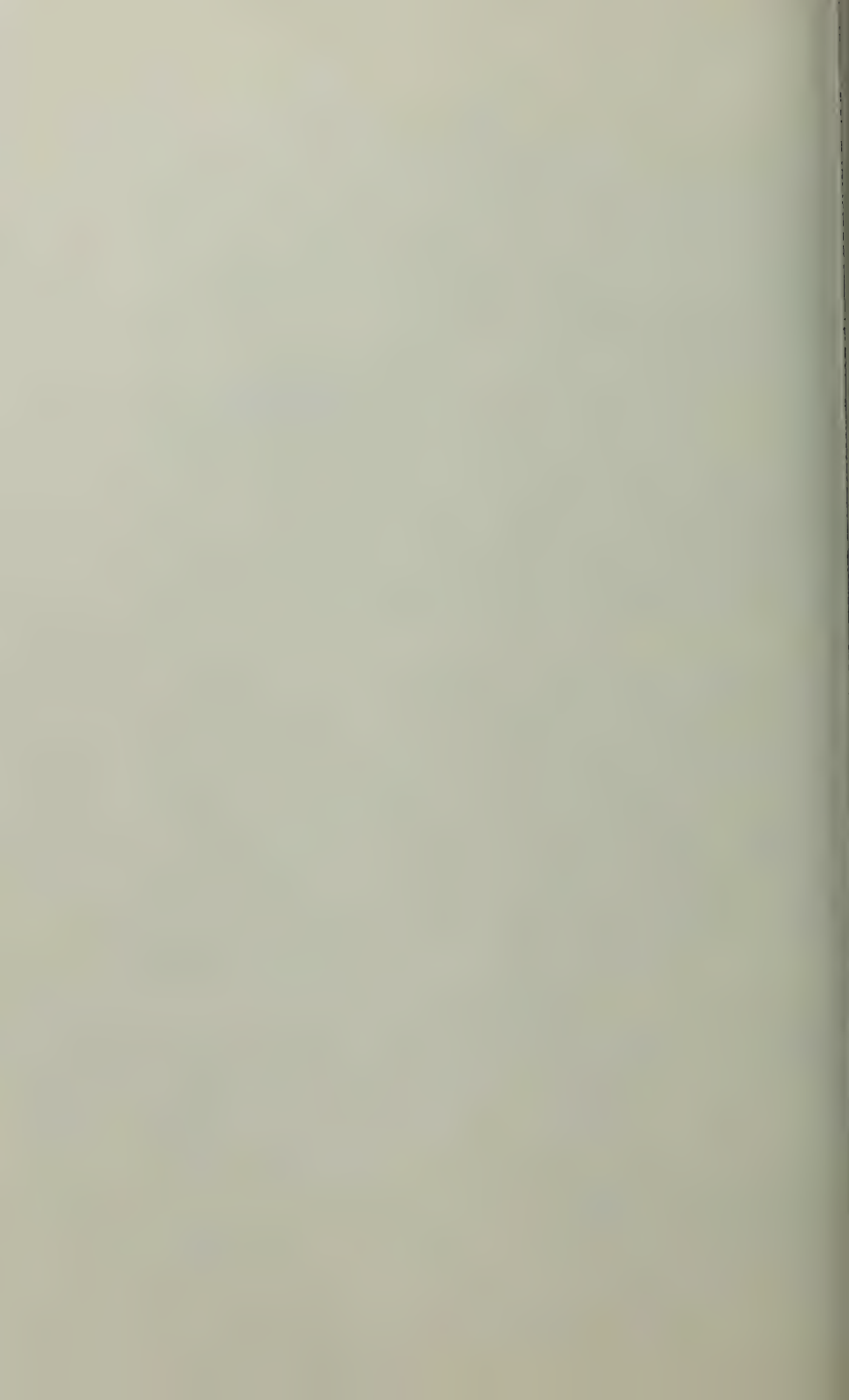
Respectfully submitted

MIKE STEPOVICH
BRUCE T. RINKER
Attorneys for Appellants

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in our opinion, the foregoing brief is in full compliance with those rules.

MIKE STEPOVICH
BRUCE T. RINKER
Attorneys for Appellants



FEB 10 1967

No. ~~20004~~

20384

IN THE
United States Court of Appeals
For the Ninth Circuit

BAKER & FORD Co.,
a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

PETITION FOR REHEARING

MIKE STEPOVICH
Attorney at Law
Fairbanks, Alaska

BRUCE T. RINKER
Attorney at Law
317 Bellingham Nat'l Bank Bldg.
Bellingham, Wash.

Attorneys for Petitioners

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 20834

BAKER & FORD Co.,
a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING Co.,
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

PETITION FOR REHEARING

Appellants-Petitioners respectfully petition the court for a rehearing in the above-entitled action on the following grounds:

I

FINDING IX THROUGH XVI (R. 85-90). No award should have been made for "acceleration" as the evidence *without conflict* showed that the undertaking of appellee

to meet the scheduled dates for completion was purely voluntary on appellee's part and resulted from an agreement between appellee and appellant to complete as scheduled "if possible."

II

FINDING XVI (R. 88-9), EXHIBIT 29, SCHEDULE 1. Even assuming a finding of "acceleration," the quantum under this schedule should not have included a price differential based on six 9-hour weeks, "acceleration" having ostensibly commenced May 1st, 1960—the six 9s not being employed until August 7, 1960, and then as the result of a plumber's walkout, rather than because of acceleration (App. Br. 34, 35).

III

FINDING XVI (R. 88-9), SCHEDULE 2, EXHIBIT 29. The amount awarded here was \$1,361.72 for small tool expense based on 2½ per cent of the claimed increased payroll of \$54,468.86 (Tr. 198-9). The District Court reduced the claimed amount from \$54,468.86 to \$30,389.40 (R. 89). Two and one-half per cent of the latter figure would be \$759.73, which would be the proper amount (App. Br. 39, 40).

IV

FINDING XVI (R. 88-9), SCHEDULE 6, EXHIBIT 29—Allowance for double-time pay, \$5,833.50. This represents a duplication of the increased cost of double-time pay reflected in Schedule 1 of Exhibit 29. The District Court made its computation based on 16,212 hours, which from an analysis of Exhibits Z and LL includes

all straight time, time and a half and double-time (the latter two being shown as "O.T."). The result is to allow for double-time hours under this schedule as well as allowing the increased costs of the double-time hours under Schedule 1 (App. Br. 43, 44, 45).

V

FINDING XVI (R. 88-9), SCHEDULE 8, EXHIBIT 29. Increased camp subsistence cost, \$12,600.00. This schedule is not supported by any evidence, conflicting or otherwise, as to its source (other than it was furnished to Mr. Urban by Mr. Way), nor as to what it was incurred for, or why or when, or its reasonableness. (App. Br. 46, 47, 48).

The District Court in its Memorandum Decision, however, as to this item (R. 71-6), reduced the claimed amount to \$7,356.00 but through some error in transmission included the amount of \$12,600 in its findings.

Respectfully submitted,

MIKE STEPOVICH
BRUCE T. RINKER

Attorneys for Petitioners

CERTIFICATE

The undersigned attorneys for petitioner herein hereby certify that in their judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

MIKE STEPOVICH
BRUCE T. RINKER

Attorneys for Petitioners

FEB 10 1967

No. 20386 ✓

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

-oOo-

CHARLES CORNET and)
)
REX STIDHAM WINDOM, JR.,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

-oOo-

APPELLANTS' OPENING BRIEF

FILED
JAN 13 1966
WILLIAM E. WILSON, Clerk

HARRY E. CLAIBORN
108 South Third S
Las Vegas, Nevada

ATTORNEY FOR APPE

No. 20386

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

-oOo-

CHARLES CORNET and)
)
EX STIDHAM WINDOM, JR.,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

-oOo-

APPELLANTS' OPENING BRIEF

HARRY E. CLAIBORNE
108 South Third Street
Las Vegas, Nevada

ATTORNEY FOR APPELLANTS

TOPICAL INDEX:

-o0o-

JURISDICTIONAL STATEMENT:	Page: 1
STATEMENT OF THE CASE	2
GENERAL STATEMENT OF THE FACTS	4
QUESTIONS RAISED BY THIS APPEAL	5
QUESTION ONE: Should the lower court have dismissed the Criminal Information on the ground it showed on its face that the fraudulent scheme was completed before any use of the mails occurred, thus rendering the lower court without any jurisdiction over the alleged offense?	5
QUESTION TWO: Was there any substantial evidence to identify the defendants as the perpetrators of the crime charged?	6
QUESTION THREE: Was there any substantial evidence that the defendants knowingly caused any mail matter to be delivered by the Post Office Department for the purpose of executing or attempting to execute a scheme to defraud?	6
QUESTION FOUR: Did the lower court prejudice the rights of the defendants by its oral instruction as to the variance of the date of mailing?	6
QUESTION FIVE: Did the lower court prejudice the rights of the defendants by refusing to give Defendants' Proposed Instruction No. 8?	7
SPECIFICATIONS OF ERROR	8
POINTS, AUTHORITIES AND ARGUMENT	10
POINT ONE: The conviction of the defendants for mail fraud violates the tenth amendment	

and the due process clause of the
 Fourteenth Amendment of the United
 States Constitution because the
 defendants did not mail, or knowingly
 cause to be mailed, any matter for the
 purpose of executing a fraudulent scheme 10

A. THE CRIMINAL INFORMATION 11

B. THE MOTION TO DISMISS 13

C. THE EVIDENCE 14

Comb 14

Anderson 14

Loveland 17

Bailey 18

Jordan 19

Asher 21

Dickinson 21

Reger 22

D. THE MOTION FOR JUDGMENT OF ACQUITTAL 23

E. AUTHORITIES 23

POINT TWO: There is no substantial evidence
 that the defendants used the mails or knowingly
 caused the mails to be used.

A use of the mails made at the direction of
 and under the supervision of Government
 agents is not imputable to the defendants

Incidental or collateral use of the mails
 made by others than the defendants will not
 support a conviction of mail fraud 30

POINT THREE: There was no evidence of substance
 to connect the defendants with the perpetration
 of a fraudulent scheme 43

POINT FOUR: By reason of the misconduct of the United States Attorney in the making of his closing argument to the jury, the courts refusal to declare a mistrial, and by reason of the refusal of the lower court to instruct the jury in accordance with defendants' requested Instruction No. 8, the defendants are entitled to a new trial

54

CONCLUSION

59

CERTIFICATE

60

STIPULATION AND PROOF OF SERVICE

60

TABLE OF CASES

<u>STATUTES:</u>	<u>PAGE</u>
Article 18 United States Code §1341	10
Nevada Laws 1965, Ch. 83 (N.R.S. Ch. 205) (Set forth in Appendix A)	29
<u>CASES:</u>	
Adams v. United States, CA 5th, 1963, 312 F.2d 137	26, 28
Benham v. United States, CA 5th, 1954, 215 F.2d 472	59
Batts v. United States, CA 8th, 1921, 273 F. 35	38
Bavis v. United States, CA 3rd, 1933, 63 F.2d 545	39
De Mayo v. United States, CA 8th, 1929, 32 F.2d 472	36
Johnson v. State, Tex.Crim.App., 1950, 235 S.W.2d 180	53
Kann v. United States, 1944, 323 U.S. 88, 65 S.Ct. 148 89 L.Ed. 88	11, 23
Koian v. United States, CA 5th, 1965, 349 F.2d 291	26, 27, 28
Merrill v. United States, CA 9th, 1938, 95 F.2d 669	27, 28
Newman v. United States, CA 4th, 1924, 299 F. 128	38
Parr v. United States, 1960, 383 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277	11, 25
People v. Lanzit, Cal.App., 1925, 233 P. 816	38
People v. Widmayer, 1948, 402 Ill. 143, 83 N.E.2d 285	53
State v. Bradley, 1954, 267 Wis. 87, 64 N.W.2d 187	53
State v. Hampton, Mo. 1955, 275 S.W.2d 356	53
State v. Jansen, 22 Kan. 498	37
State v. Neely, Mont., 1931, 300 P. 561	38

TABLE OF CASES (Continued)

<u>CASES:</u>	<u>PAGE:</u>
State v. Teeter, 1948, 65 Nev. 584, 200 P.2d 857	59
United States v. Eman Mfg. Co., Colo., 1920, 271 F. 353	36
United States v. Dale, Cal., 1915, 230 F. 750	40
United States v. Sampson, 1962, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136	11
Wagner v. United States, CA 5th, 1959, 263 F.2d 677	59
Woo Wai v. U.S., 137 CCA 604, 223 F. 412	38

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

-oOo-

CHARLES CORNET and

STIDHAM WINDOM, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Case No. 20386

APPELLANTS' OPENING BRIEF

EXTRAJUDICIAL STATEMENT:

Defendants were prosecuted in the United States District Court for the District of Nevada from a Criminal Information charging mail fraud in violation of Title 18, Section 1342, United States Code. (T.R. Vol 1, page 19-21)

The case was tried to a jury which returned verdicts finding the defendants guilty as charged. (T. R. Vol 1, pp. 55-56) The defendants were adjudged guilty and sentenced to imprisonment. (T. R. Vol 1, pp. 64-65)

The defendants appealed to this Court from the verdict of the jury and the judgment and sentence of the United

STATEMENT OF THE CASE:

On March 20, 1964, a criminal complaint was filed with the United States Commissioner for the District of Nevada charging the defendants with violation of the United States Code, Title 18, Section 1341, for mail fraud, on March 12, 1964, and warrants were on the same day issued for the arrest of the defendants. (T. R. Vol 1, p. 6) The criminal complaint appears at pages 7-10 of the Transcript of Record, Volume One.

On March 20, 1964, the defendant Windom was arrested and brought before the United States Commissioner at Phoenix, Arizona, where Defendant Windom waived hearing and was admitted to bail bond for which was posted in Arizona on March 23, 1964, and forwarded to Nevada. (T. R. Vol 1, p. 11)

The defendant Cornet was arrested in the State of Nevada and bail was fixed on March 20, 1964. (T. R. Vol 1, p. 6) Bond for Defendant Cornet was executed on March 27, 1964. (T. R. Vol 1, p. 18)

Criminal Information No. 958 charging the defendants for mail fraud in violation of Title 18, Section 1341, United States Code, was filed in the United States District

Court for the District of Nevada on May 1, 1964, (T. R. Vol 1, pp. 19-21) on which date the defendants pleaded Not Guilty. (T. R. Vol 1, p. 2, docketed for 5/1/64)

On February 23, 1965, the defendants moved the dismissal of the Information on the ground the Court had no jurisdiction of the offense since the Information showed on its face that the mailing of the offensive matter was after the fruition and completion of the alleged fraudulent scheme. (T. R. Vol 1, p. 22) Following argument to the court on the motion on March 26, 1965, the lower court denied defendants' motion to dismiss. (T. R. Vol 1, p. 3), Docket Entry for 3/26/65) A two-day jury trial was commenced on July 1, 1965, and the jury returned verdicts finding each of the defendants guilty as charged. (T. R. Vol 1, pp. 55-56)

The defendants thereafter filed their motion to dismiss, motion for judgment of acquittal and motion for new trial (T. R. Vol 1, p. 57) which was argued to and denied by the lower court on August 16, 1965. (Vol 4, T. R.) On August 16, 1965, the defendants were adjudged guilty and each was sentenced to imprisonment for a period of five (5) years and to pay a fine of \$1,000.00. (T. R. Vol. 1, pp. 64-65)

Appeal was taken from the verdict of the jury, the judgment and sentence of the lower court to the United States Court of Appeals for the Ninth Circuit on August 16, 1965.

GENERAL STATEMENT OF FACTS:

The defendants were charged with using the mails to defraud in violation of Title 18, Section 1341, United States Code, for fraudulent and unauthorized use of a Phillips Petroleum Company Credit Card issued to Allied Oklahoma Corporation for the purpose of obtaining from Phillips Petroleum Company, Inc. and the Allied Oklahoma Corporation, three automobile tires of the value of \$150.00 and service to the automobile of the value of \$22.55, at a Phillips 66 Gasoline Service Station in Las Vegas, Nevada.

It was charged that as a part of the scheme and artifice to defraud that "on or about March 18, 1964, the aforesaid invoices also known as delivery tickets also known as credit slips would be and were forwarded in the ordinary course of business by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri." (T. R. Vol. 1, p. 21, Paragraph 7)

It was further charged that "On or about March 18, 1964, at Las Vegas, Clark County, State and District

of Nevada, defendants Corner and Window, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter, in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon, from Saveaway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri. (T. R. Vol. 1, p. 21, Paragraph 8)

As already noted under the Statement of the Case, the defendants moved for the dismissal of the criminal information asserting the court was without jurisdiction of the alleged offense since the information showed on its face that the alleged fraud was completed before any use of the mails occurred. The Court denied this motion and jury trial was had, where issues were raised and litigated concerning the following questions on this appeal:

QUESTIONS RAISED BY THIS APPEAL:

I.

Should the lower court have dismissed the Criminal Information on the ground it showed on its face that the fraudulent scheme was completed before any use of the mails

occurred, thus rendering the lower court without any jurisdiction over the alleged offense?

2.

Was there any substantial evidence to identify the defendants as the perpetrators of the crime charged?

3.

Was there any substantial evidence that the defendants knowingly caused any mail matter to be delivered by the Post Office Department for the purpose of executing or attempting to execute a scheme to defraud?

4.

Did the lower court prejudice the rights of the defendants by instructing the jurors as follows:

"You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada, to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as matter that can be mailed was mailed, and that the

milling did not happen on the 18th of March, as charged, but sometime after the 21st, between the 23rd and the 24th, and again it is by implication of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberations." (T. R., Vol. 3, p. 219)

5.

Did the lower court prejudice the rights of the defendants by refusing to instruct the jury in accordance with Defendants' Proposed Instruction No. 8 presented to the lower court after the close of argument to the jury by the Government wherein the Government Prosecutor made certain misstatements of the evidence in the case:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

The consideration of each of these questions

requires a detailed analysis of portions and aspects of the record which are essentially different and distinct; therefore, the facts will be set forth separately under the Points of this Brief dealing with the foregoing questions.

SPECIFICATIONS OF ERRORS:

1. The lower court erred in denying the defendants' motion to dismiss the criminal information, made before the commencement of the trial.

2. The lower court erred in denying the defendants' motion for judgment of acquittal made at the conclusion of the Government's case-in-chief.

3. The lower court erred in instructing the jury as follows:

"You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada, to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as matter than can be mailed

was mailed, and that the mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you do find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberation." (T. 2., Vol. 3, p. 219)

4. The lower court erred in refusing to instruct the jury according to Defendants' Proposed Instruction No. 8 as follows:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

5. The lower court erred in denying the motion of the defendants to dismiss the information, for judgment of acquittal and for a new trial.

was mailed, and that the mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberation." (T. R., Vol. 3, p. 219)

4. The lower court erred in refusing to instruct the jury according to Defendants' Proposed Instruction No. 8 as follows:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there is conflict in your minds as to what any witness may have testified to during the trial."

5. The lower court erred in denying the motion of the defendants to dismiss the information, for judgment of acquittal and for a new trial.

POINT ONE

THE CONVICTION OF THE DEFENDANTS FOR MAIL FRAUD VIOLATES THE TENTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE DEFENDANTS DID NOT MAIL, OR KNOWINGLY CAUSE TO BE MAILED, ANY MATTER FOR THE PURPOSE OF EXECUTING A FRAUDULENT SCHEME.

Section 1341, Title 18, United States Code

provides, in pertinent part, as follows:

"Whoever, having devised x x x any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses x x x for the purpose of executing such scheme x x x places in any post office or authorized depository for mail matter, any matter to be sent or delivered by the Post Office Department, x x x or knowingly causes to be delivered by mail according to the direction thereon x x x any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

...sufficiently by the criminal investigation
of the system... determined under the
following principles:

(1) The purpose of the Federal mail fraud
statute was to prevent the post office from being used to
carry schemes to defraud into effect.

(2) The mail fraud statute does not purport
to reach all frauds, but only those limited instances in which
use of the mails is a substantial part of the execution of
the fraud -- all other cases are left to be dealt with by
appropriate state laws.

(3) Incidental and collateral use of the
mails which occurs after the fraudulent scheme has been fully
executed does not vest a federal court with jurisdiction under
the mail fraud statute.

These principles are laid down in the cases of

Kann v. United States, 1944, 323 U.S. 88, 45 S.Ct. 143,

89 L.Ed. 88;

Parr v. United States, 1960, 363 U.S. 370, 80 S. Ct. 1171,

4 L. Ed. 2d 1277; and

United States v. Sampson, 1962, 371 U.S. 75, 83 S. Ct.

173, 9 L.Ed. 2d 136.

THE CRIMINAL INFORMATION: (T.R. Vol. 1, pp. 19-21)

The substance of the accusation was that on

About March 12, 1934, the defendants devised a scheme to defraud and obtain money and property by false and fraudulent practices from Phillips Petroleum Company, Inc., by making an unauthorized use of a credit card issued by that company to Allied Shoma Corporation.

The following acts were alleged to be part of the scheme to defraud:

(1) That the defendants would and did ask an attendant at Sayway 15, a Phillips 66 Gasoline Service Station in Las Vegas, Nevada, whether he would allow them to purchase automobile tires on credit; (2) that the defendants would and did order and receive three tires for a Lincoln Continental of value of approximately \$150.00 from an attendant at the Sayway Service Station, and service to the automobile of a value of approximately \$22.35; (3) that the defendants would and did pay for the automobile tires received and the service provided by giving the service station attendant a Phillips Petroleum Company credit card, for which the attendant would and did extend credit to the defendants for the purchase of the tires and service; (4) that from the credit card, a delivery ticket, also known as a credit slip, would be and was prepared and would be and was signed by defendant Windom with the name "J. Fox" as the customer-obligor

on the invoice, also known as the credit slip; (5) that the credit card would be and was representative of an account of Allied Oklahoma Corporation, which credit card would be and was used by the defendant without the knowledge, without the consent and without the authorization of the Allied Oklahoma Corporation; (6) that the aforesaid invoice also known as a delivery ticket also known as a credit slip would be and was forwarded and caused to be forwarded by defendants by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

Finally, the information set forth that on or about March 18, 1964, at Las Vegas, Nevada, the defendants, for the purpose of executing the scheme, knowingly caused to be placed in an authorized depository for mail matter, in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon, from Saveway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

B. THE MOTION TO DISMISS:

The defendants moved for the dismissal of the information on the ground it showed on its face that the mailing of the offensive matter was after the fruition and

completion of the alleged fraudulent scheme. (T. R. Vol. 1, p. 22) The motion was argued to the court (T. R. Vol. 2) and denied by the Court (T. R. Vol. 1, p. 3, Docket Entry for 1/26/65).

1. THE EVIDENCE:

PHILIP L. COMB testified that in January of 1964 he was employed as the vice-president and general manager of Allied Oklahoma Corporation in Sand Springs, Oklahoma. As such official he had the use of a credit card issued to Allied Oklahoma Corporation by Phillips Petroleum Company. He lost the credit card on January 8, 1964, and notified Phillips Petroleum Company of the loss. (T. R., Vol. 3, pp. 12, 13) He further testified that he had never been in Las Vegas before his trial; that he did not know the defendants and had not authorized anyone named Charles Cornet, Rex Stidham Windom, or J. Box to use his credit card (T. R., Vol. 3, p. 14) and that he did not drive a Lincoln Continental automobile and had not purchased tires for a Lincoln Continental automobile at a Phillips 66 Service Station in Las Vegas on March 12, 1964. (T. R. Vol. 3, p. 15)

WILBERT EUGENE ANDERSON testified that in March of 1964 he was employed as a station attendant at

Phillips Station Number 15 in Las Vegas, Nevada. He got a phone call in the evening from a caller who wanted to know if he had a 900-14 tire. He advised the caller the station had such tires and a little while later a green 1956 or 1957 Plymouth drove into the station. There were two men in the car. The driver of the car was defendant Cornet. The driver asked the attendant for the tires and the attendant told them he had them. (T. R. Vol. 3, pp. 19-21) The attendant testified that he recognized the defendant Cornet as the driver of the car, and he believed he recognized the defendant Windom as the passenger in the car. (T. R. Vol. 3, p. 21) The driver of the car told the witness it was a credit card purchase and the other man passed the credit card across to the driver who gave it to the attendant. (T. R. Vol. 3, p. 22) The attendant took the credit card and checked it against the station's "hot list" of stolen or expired credit cards. This credit card was not on the hot list. The two men left in the Plymouth. They were gone a few minutes and then came back with the Plymouth and another car. The defendant Cornet was driving the Plymouth. The other car was a Lincoln. It was a pinkish color, but the attendant did not remember the year of its make. The other man was driving the Lincoln. They gave a work order as to what they wanted done and left. The work order included "a lube

job, change the oil, filters, and the tires." (T. R. Vol. 3, pp. 23-24) The tires were premium action tread white sidewall tires. The attendant (with the assistance of another attendant, John Loveland) installed three tires on the Lincoln, lubed it, changed the oil and filters. That took about two and a half hours and then the men came back to get the Lincoln and the attendant put gas in the Lincoln and he thinks, also, in the Plymouth. (T. R. Vol. 3, pp. 24-25) The attendants took care of the paper work of making out the credit card invoices, the work order slip and tallying it up. The defendant Cornet gave the attendant the credit card but the attendant believed that the defendant Cornet had received the credit card from the other man. (T. R. Vol. 3, p. 25) The tires were mounted on the two front wheels and the left rear wheel. (T. R. Vol. 3, pp. 25-26) The attendant made out two credit slips. The delivery tickets were signed in the presence of this attendant and when asked which individual signed them, he testified "I believe it was the other man, the one on the far end." (T. R. Vol. 3, p. 27) The men didn't want a tire guarantee (T. R. Vol. 3, p. 28). The attendant thought the other attendant (John) had put a service sticker on the car. (T. R. Vol. 3, p. 28)

On March 18, 1964, this attendant gave a statement to the Federal Bureau of Investigation regarding the transaction. (T. R. Vol. 3, p. 31) The attendant testified as to what he customarily did with the signed cards: " . . . on the evening shift, when you check out, you just put it with the inventory slip, the station inventory slip, and you put it in the drawer and the manager of the station, he turns them into the office." (T. R. Vol. 3, p. 53)

JOHN S. LOVELAND: He testified that he was also employed as a station attendant at the Phillips 66 station on the night in question. (T. R. Vol. 3, p. 64) He testified the defendants came into the station for some tires and complete service on their car. (T. R. Vol. 3, p. 65) They came in together in a 1956 Plymouth. It was two-tone but he did not recall the color. Wilbur Anderson, the other attendant, was at the station. Loveland went out to the car to see what they wanted. They wanted to talk to the other attendant so the other attendant came out and they had this credit card and they wanted to know if it was good, so the two attendants went in the station and checked it out on the hot list. (T. R. Vol. 3, p. 66) The defendant Cornet was driving the Plymouth and it was the defendant Cornet who produced the credit card. After being notified the credit card was good the two men left. Later they came back in

Plymouth and the car that the tires were later put on. It was a big brown car. (T. R. Vol. 3, p. 68) This attendant did not see anyone sign the credit card tickets and didn't know who signed them. (T. R. Vol. 3, p. 70) This attendant said he believed it was the defendant Windom who told him he wouldn't need a service sticker and not to take time to put one on. (T. R. Vol. 3, p. 71) After further examination the Government brought out that when this witness had given a statement to the Federal Bureau of Investigation on March 20, 1964, the witness had then stated that it was the defendant Cornet who did not want a tire guarantee or a mileage sticker put on the car. (T. R. Vol. 3, p. 79) This witness had been interviewed by the FBI at his home on the day before the statement was given, March 19, 1964. (T. R. Vol. 3, p. 94)

CARL LEE BAILEY testified he was a petroleum robber for Phillips Petroleum Company, for the company named Gateway Super Service Stations, Incorporated. (T. R. Vol. 3, p. 103) It was the practice of this company to use certain forms for the reporting of credit card sales. One of these forms 677(d), marked Government's Exhibit 6, showed that there were two credit card sales on March 12, 1964 for the credit card number in question, one for \$165.73 and the other for \$22.55.

that form carried a total figure of \$325.92. Another form, company form number 2275, Government's Exhibit No. 7, dated March 20, 1964, reflected that the credit card sales on the 677(d) form came from the Phillips 66 Service Station in question. (T. R. Vol. 3, p. 109) It was the practice of the station manager to prepare form 677(d) the day following the sale. He did not prepare form 2275 on any particular day, but they were usually prepared two to three times a week. (T. R. Vol. 3, p. 109) After the preparation of form 2275, it was the practice of the petroleum jobber company to take credit for the total amount against any money that the jobber might owe Phillips Petroleum. When the original of the form was folded around the credit cards themselves and they were mailed to the Phillips Petroleum in Kansas City. (T. R. Vol. 3, p. 110) Mr. Bailey also produced a pink slip numbered 004247 which showed that on March 24, 1964, the man who actually mailed the instruments was reimbursed \$16.10. (T. R., Vol. 3, p. 110)

CARL EDWARD JORDAN testified that he was assistant office manager, machine division, Phillips Petroleum Company, and was in charge of receiving credit card invoices and their subsequent billing to credit card customers. (T. R. Vol. 3, p. 111) He identified Government's Exhibit Number 8 as a box

aving his name, title and date on it: "Carl E. Jordan,
Assistant Office Manager, Machine Division, Phillips Petroleum
Company, Credit Card Office, Kansas City, Missouri, March 26,
1964." (T. R. Vol. 3, p. 113) He first saw the box when it
was emptied out of a mail bag on the company's mail sorting table
in its receiving section and at that time he placed his initials
in the box, March 26, 1964, and at the same time he placed his
initials and the date March 26, 1964 on delivery tickets from
Aveaway Service, Incorporated, in Las Vegas, which were among
the items contained in the box. (T. R. Vol. 3, pp. 113-114)
The box was post marked in Las Vegas on March 23, 1964. (T. R.
Vol. 3, p. 115) This witness had been instructed by his super-
visor to turn the box over to an agent from the FBI, and to
identify the fact that he had received it, he placed his name
in it. (T. R. Vol. 3, p. 115) This witness had received in-
structions from his supervisor or his superior officer to return
the box when it came in from Las Vegas some three or four days
before the time it was received, somewhere around the 20th.
(T. R. Vol. 3, p. 116) It was not the practice of the Las Vegas
Office to mail the forms out at any specific time. ". . . they
mail them daily or weekly or whatever they feel like. There is
no set time or anything that they have to mail them." (T. R.
Vol. 3, p. 119)

JERRY ASHER STATHAM testified he was employed in the credit card office of Phillips Petroleum Company in Kansas City, Missouri. (T. R. Vol. 3, p. 120) This witness produced form numbered 689 which he designated a bad debt charge-off. He also produced some invoices and from these records testified they showed a bad debt loss of \$316.60. (T. R. Vol. 3, p. 121) Government's Exhibits 9 and 10 were delivery tickets numbered 892509 and 892510 showing two charge sales from Saveway Station number 15 on March 12, 1964 -- three times for \$165.73 and a gasoline purchase, motor oil, oil filter, lube, air filter for \$22.55. (T. R. Vol. 3, p. 123) The witness testified neither of these charges had been paid. (T. R. Vol. 3, p. 123) The witness testified that he was informed on March 18, 1964, he was informed by a phone call from Mr. Smith, an FBI agent in Kansas City, that the credit card was being misused. (T. R. Vol. 3, p. 127)

EUGENE LEE DICKINSON testified he lived in Oklahoma City and that in 1963 he owned an automobile bearing Oklahoma License Plate No. XW-7139 when he traded it off on February 12, 1964 at Raney's Used Car Lot in Phoenix, Arizona; that the defendant Windom was present at the car lot and was living part of the time in an old house back of the garage. (T. R. Vol. 3, pp. 132, 133, 134, 135, 136)

ROY REGER, a special agent of the Federal Bureau of Investigation, testified that he arrested the defendant Windom on March 20, 1964 (T. R. Vol. 3, p. 143) at Raney's Used Car Lot in Phoenix, Arizona. At the time of the arrest there was a 1961 Lincoln, light pink sedan parked on the used car lot. The arresting officers examined the Lincoln. They looked for a service sticker but were unable to locate any service sticker on the car. They noticed three tires on the car which appeared to be practically new, two on the front wheels and one on the left rear wheel. These tires were Phillips 66 tires and the writing on these tires indicated that they were premium action tread, low profile, white sidewall nylon tubeless four-ply tires and the size was 900-950 by 14. The tires were removed from the car and placed in the office of the FBI in Phoenix and at the time of the trial were in Las Vegas. (T. R. 144-146) The Lincoln automobile had Arizona dealers plate number 7199 at the time it was examined. This officer testified that at the time of his arrest the defendant Windom stated "I have just got some new tires for my car." (T. R. Vol. 3, p. 148) The defendant Windom told the officer that the pink Lincoln which he was examining belonged to Mr. Raney, and the officer further testified that

e believed someone from his office later verified the fact that
the automobile did belong to Mr. Raney. (T. R. Vol. 3, p. 148)

THE MOTION FOR JUDGMENT OF ACQUITTAL:

At the conclusion of the testimony of the
witness Roy Reger, the Government rested and the defendants moved
for judgment of acquittal on the grounds, among others, that the
evidence did not establish a scheme to defraud of which any use
of the mails was an integral part -- that any fraudulent scheme
was complete before any use of the mails occurred. (T. R. Vol. 3,
beginning at p. 154) The motion was denied. (T. R. Vol. 3, p.
172) After the denial of this motion the defendants rested their
case. (T. R. Vol. 3, p. 174)

AUTHORITIES:

The case of Kann v. United States, *supra*, held
that where persons cashed checks and received the money which
they intended to receive under a fraudulent scheme, the fact that
the checks were forwarded by mail from the local bank to the
lawee bank for payment by the drawer, did not bring the fraudulent
scheme under the mail fraud statute. The court said:

"The remaining contention is that the checks were
not mailed in the execution of, or for the purpose of
executing, the scheme. The check delivered to the five
defendants by the building contractor in payment for

timber they claimed to own was cashed by them at a local bank in Elkton, Maryland. By cashing it they received the moneys it was intended they should receive under the scheme. The Elkton bank became the owner of the check. The same is true of the bonus check delivered to defendant Willis and deposited and credited to his account. The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires."

Since one element of the offense defined by the mail fraud statute was lacking, that the mailing must be for the purpose of executing the fraud, the judgment of conviction was reversed.

In Parr v. United States, supra, the defendant members of a school board were charged with using the mails to defraud the school district. Some of the counts related to use of an oil company credit card of the District to procure gasoline and oil for the personal use of the defendants at the expense of the District. The convictions of the defendants were reversed because the mailings relied on to vest federal jurisdiction, two invoices from the oil company, at Houston, Texas, to the District, Benavides, Texas, and the check in payment of the invoices mailed from the District to the Oil Company, were not done in execution of the fraudulent scheme. The Court said:

" . . . Here, as in Kann, '(t)he scheme in each case had reached fruition' when Carrillo and Garza received the goods and services complained of. 'The persons intended to receive the (goods and services) had received (them) irrevocably. It was immaterial to them, or to any consummation of the scheme, how the (oil company) x x x would collect from the (District). It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 U. S. at page 94, 65 S. Ct. at page 151" (363 U.S. at page 393, 80 S.Ct. at page 1184)

the court concluded:

" . . . the showing, however convincing, that state

crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process."

Since the decision in Parr, two other "credit card cases" have been reported:

Adams v. United States, CA 5th, 1963, 312 F. 2d 137; and

Kloian v. United States, CA 5th, 1965, 349 F. 2d 291.

In Adams the defendant was charged with using the mails to defraud the Gulf Oil Company and one William Magie, holder of a credit card of that oil company. It was proved that the defendant used Magie's credit card without Magie's authorization for several months during which time he made some hundred purchases from Gulf distributors in several states. The cases of Kann and Parr were considered by the court and held to be decisive of this case because all of the various sales to the defendant were but part of "one unitary scheme" and that "numerous mailings occurred before the scheme, taken as a whole, was consummated." The court also held that the use of the mails to forward the sales slips occasioned a delay in the

detection of the defendant's scheme to defraud, which permitted him to expand the scope of his operations.

In Kloian, the defendant moved for post-conviction relief on the ground the Information charging mail fraud to which he plead guilty did not charge an offense. The information charged that the defendant made two separate purchases with attendant mailings, and that the period of the purchases was spread over a period of approximately two weeks. The court held the case came under the ruling of Adams and upheld the conviction.

The United States Court of Appeals for the Ninth Circuit has also had occasion to speak on the issues involved:

In Merrill v. United States, CA 9th, 1938, 5 F.2d 669, a mail fraud conviction was reversed where the letters relied on to prove use of the mails in execution of the fraud were all written after the latest allegedly fraudulent stock sale. There being no evidence that the fraudulent scheme was still in existence at the time the letters were delivered, it obviously could not be said that the letters were delivered for the purpose of executing the scheme. The court also held that there was no presumption that the fraudulent scheme continued after the stock sale ceased. The defendants did not have the burden of proving the termination of the scheme. Instead, the

burden was on the Government to prove not only that the scheme had once existed, but that it was still in existence when the indictment letters were delivered.

It is not subject to dispute under the foregoing authorities that under the mail fraud statute, the basis of federal jurisdiction, and the gist of the crime, is the use of the postal facilities in the execution of or the attempted execution of a fraudulent scheme. When the fraudulent scheme charged against the defendants has been completed and the defendants have received the fruits thereof before any use of the mails occurs, as this Court said in Merrill v. United States, supra, "it obviously cannot be said that the letters were delivered for the purpose of executing the scheme."

The only basis upon which the conviction of the defendants was upheld in Adams v. United States, supra, and Kloin v. United States, supra, was that the scheme involved a continuing use of the credit card over an extended period of time. There are no facts in evidence in the present case which can be looked to to bring this prosecution under the rule of those cases. On the contrary, the fraudulent scheme charged in the information and the evidence relied on to support it related to a single, isolated instance of the obtaining of automobile

tires and service to an automobile through the unauthorized use of an oil company credit card. The property and services were rendered and received by all the proof at Las Vegas, Nevada on March 12, 1964. No use of the mails occurred until March 23, 1964, (T. R. Vol. 3, pp. 115), the date of the postmark on the mail matter.

By the date of March 23, 1964, not only had the fraudulent scheme charged been fully completed for eleven days, but the defendants had already been complained against and had been arrested on March 20, 1964, three days before the use of the mails occurred. (See the Statement of the Case)

These extraordinary circumstances, dealt with in detail under the following Point, bring out the hard kernel of truth in this case, that the use of the mails relied on to support the conviction of the defendants was knowingly caused by the Government itself for the purpose of federal prosecution.

Finally, it should be noted that the offense of obtaining goods, property, services or anything of value by the unauthorized use of a credit card is one which is specifically defined and made punishable by the Law of Nevada under Chapter 83 of the Laws of 1965, amended Chapter 205 of the Nevada Revised Statutes. The text of this law is set forth

in Appendix A attached hereto.

POINT TWO

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS USED THE MAILS OR KNOWINGLY CAUSED THE MAILS TO BE USED.

A USE OF THE MAILS MADE AT THE DIRECTION OF AND UNDER THE SUPERVISION OF GOVERNMENT AGENTS IS NOT IMPUTABLE TO THE DEFENDANTS.

INCIDENTAL OR COLLATERAL USE OF THE MAILS MADE BY OTHERS THAN THE DEFENDANTS WILL NOT SUPPORT A CONVICTION OF MAIL FRAUD.

The chronology of events in this prosecution is extraordinary. Probably no other case like it exists.

On March 12, 1964, according to the witnesses Anderson and Loveland, the station attendants at a Phillips 66 Service Station in Las Vegas, Nevada, two persons obtained automobile tires and service from the station. One of the men produced an oil company credit card, and the transaction was handled as a credit card transaction. The credit card was checked by one of the attendants against the company's "hot list" and did not appear thereon. (The testimony of these witnesses is set forth in more detail and with references to pages of the transcript of record under Point One hereof)

On March 18, 1964, the service station attendant Anderson gave a written statement to the FBI (T. R. Vol. 3, p. 31). The same day, March 18, 1964, the witness Statham, who was employed in the credit card office of Phillips Petroleum Company in Kansas City, Missouri, was informed by a phone call from Mr. Smith, an FBI agent in Kansas City, that the credit card involved in the transaction was being misused. (T. R. Vol. 3, p. 127)

On March 19, 1964, the witness Loveland, the other service station attendant was interviewed at his home by the FBI, and on the following day, March 20, 1964, Loveland gave a written statement to the FBI (T. R. Vol. 3, p. 79).

On March 20, 1964, a criminal complaint was filed with the United States Commissioner for the District of Nevada charging the defendants with the commission of the crime of mail fraud. (T. R. Vol. 1, pp. 7-10). (The allegations of the complaint are exactly the same as the allegations of the criminal information which was filed on May 1, 1964, except that in the criminal information the value of the service for the automobile is alleged to be approximately \$22.55) It was charged in the complaint that:

"7. It was a further part of the scheme and artifice to defraud that on or about March 18, 1964,

the aforesaid invoice also known as a delivery ticket also known as a credit slip would be and was forwarded and caused to be forwarded by defendants Windom and Cornet by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

8. On or about March 18, 1964, at Las Vegas, Clark County, State and District of Nevada, defendants Windom and Cornet, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter in the District of Nevada, a letter to be sent and delivered by the Post Office Department according to the directions thereon from Saveway Super Stations, Inc., Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri." (T. R. 1, p. 9-10)

The complainant, Orville F. McVay, Special Agent Federal Bureau of Investigation, set forth as one of the matters showing probable cause the following:

"3. Jack Cason, Saveway Super Stations, Inc., Las Vegas, Nevada, advised said credit slips reflecting the purchase of the tires and services were mailed to Phillips Petroleum Company, Inc.,

Kansas City, Missouri, on or about March 18,

1964." (T. R. 1, p. 10)

On March 20, 1964, the defendant Cornet was arrested in Las Vegas, Nevada and his bail was fixed at \$5,000.00 (T. R. Vol. 1, p. 6).

On March 20, 1964, the defendant Cornet was arrested in Phoenix, Arizona and taken before the United States Commissioner there where his bail was fixed at \$5,000.00. (T. R. Vol. 1, p. 11)

About March 20, 1964, the witness Carl Edward Jordan, assistant office manager, machine division, Phillips Petroleum Company in Kansas City, Missouri, was instructed by his supervisor or superior officer to retain mail matter when it arrived from Las Vegas, Nevada. (T. R. Vol. 3, p. 116) It was not the practice of the Las Vegas office to mail the forms out at any specific time; ". . . they mail them daily or weekly or whatever they feel like. There is no set time or anything that they have to mail them." (T. R. Vol. 3, p. 119)

On March 24, 1964, an individual who purportedly mailed the matter relied on was reimbursed \$16.10 according to the testimony of the witness Carl Lee Bailey, the Phillips Petroleum Company jobber for Saveway Super Service Stations, Incorporated. (T. R. Vol. 3, p. 110).

Mr. Bailey testified that after the service station attendants collect the credit card slips and tally them on the company's form 677(d), they are sent to the office of Saveway, then they are listed on a recap sheet, Saveway takes credit for the total amount against any money it might owe Phillips Petroleum, then the form with the credit card slips is mailed to Phillips Petroleum in Kansas City. (T. R. Vol. 3, pp. 105, 110)

On March 26, 1964, the witness Carl Edward Jordan, Phillips' assistant office manager in the machine division, received and marked for identification a box addressed to him and bearing a postmark in Las Vegas on March 23, 1964 (T. R. Vol. 3, pp. 113-115) which box, under instructions from the agent from the FBI he dated and initialled for identification, (T. R. Vol. 3, p. 115) and then opened and marked the credit card slips for identification as directed by the FBI agent. (T. R. Vol. 3, p. 114-116)

Finally, the witness Strathan testified from the records of Phillips Petroleum that the charges for the tires and automobile service had not been paid and constituted part of a total bad debt loss of \$316.60 on form number 689 designated bad debt charge-off. (T. R. Vol. 3, pp. 121-123)

The foregoing matters of record establish

that the mailing relied upon was directly caused by agents of the United States Government and its progress was superintended to its destination where an agent of the United States Government was on hand to specify how it should be marked for identification and to take delivery of it. The mailing relied upon to convict these defendants did not occur until three days after the defendants had been arrested and charged with the crime of making that mailing!

Agents of Saveway 15, and Phillips Petroleum Company, knew, as early as March 18, 1964, that an unauthorized use had been made of the credit card.

The record does not establish where the responsibility of loss normally falls in connection with unauthorized credit card sales. Here, as always, it was the burden of the Government to prove its case against the defendants.

What the record does establish is that an instance of misuse of a credit card came to the attention of the FBI and its agents, who, after they had procured the arrest of the defendants, then effected the use of the mails in order to prosecute the defendants.

The case is analogous to cases of entrapment where an over-zealous agent of the Government, bent on bringing home a case to be prosecuted, will himself perform an act which is

an element of the crime and without which the crime is not complete. This occurred in the case of:

DeMayo v. United States, CA 8th, 1929,

32 F.2d 472. The defendant was convicted of conspiracy and of introducing intoxicating liquor into Indian Territory in Oklahoma. One Kelsey was a feigned conspirator, who was acting as a representative and agent of United States prohibition officers. It was Kelsey who performed the vital overt acts of carrying the liquor into the Indian Territory on Oklahoma. The court held that Kelsey's acts could not be relied on as overt acts to make out a case of conspiracy, and could not be relied on to prove the substantive crime. The court said:

" . . . we are of opinion that government officers should not so far participate as themselves to perform unaided by any of the conspirators the crucial acts of introducing the liquor into the forbidden territory. They may properly afford opportunity to those suspected of crime to commit the original offense. They may be participants to a certain extent, but they, themselves, may not unaided, as in this case, do the very overt act which is essential to the consummation of the offense charged."

The court quoted with approval the decision in State v. Jansen,
22 Kan. 498:

"The act of a detective may, perhaps, not be imputable to the defendant, as there is a want of a community of motive. The one has a criminal intent, while the other is seeking the discovery and punishment of crime. But where each of the overt acts going to make up the crime charged, is personally done by the defendant, and with criminal intent, his guilt is complete, no matter what motives may prompt or what acts may be done by the party who is with and apparently assisting him. Counsel have cited and commented upon several cases in which detectives figured, and in which the defendants were adjudged guiltless of the crimes charged. But this feature distinguishes them, that some act essential to the crime charged, was in fact done by the detective, and not by the defendant; and this act not being imputable to the defendant, the latter's guilt was not made out. Intent alone does not make crime. The intent and the act must combine; and all the elements of the act must exist and be imputable to the defendant."

See also, State v. Neely, Montana, 1931, 300 P. 561; People v. Lanzit, Cal. App. 1925, 233 P. 816.

Another instructive case is that of United States v. Eman Mfg. Co., Dist. Ct. Colo, 1920, 271 F. 353, where it was held that the manufacturer of a certain medicinal preparation alleged to have been misbranded could not be convicted of shipping a misbranded article in interstate commerce where the only shipment of such character shown was on an order sent from another state for the purpose of entrapment by a government agent, who had no reason to suppose the defendant had ever previously made such a shipment. Relying on the case of Woo Wai v. U.S., 223 Fed. 412, 137 CCA 604, among others, the court held in the interests of sound public policy the defendant should not be convicted.

As was said in the cases of:

Butts v. United States, CA 8th, 1921, 273 F. 35; and
Newman v. United States, CA 4th, 1924, 299 F. 128,

"The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Proof that the defendant mailed, or directly caused to be mailed, the objectionable matter, is crucial to prove the crime of mail fraud and federal jurisdiction over the

offense. Mere proof that a letter or other matter was received through the mail is not proof that the defendant mailed it. This is illustrated in the case of Davis v. United States, CA 3rd, 1933, 63 F. 2d 545. There the defendant made out a false financial statement which he delivered to another. The person who received the statement was to show it to his employer and then give it to a certain board of trade. Contary to the original intention of the person who received the false statement, instead of personally delivering it to the board of trade, he mailed it. The court held this was not sufficient to support a conviction for use of the mails to defraud by the person who had prepared the false statement:

"Thus the sole question is whether that was enough evidence on which to submit the issue of mailing. This court in Freeman v. United States, 20 F.2d 748, 750, Berliner v. United States, 41 F.2d 221, 22, and Cohen v. United States, 50 F.2d 819, 821, ruled in effect that the charge of mailing, an essential element of the offense, particularly important because it is also the jurisdictional element, must be approved, and that a letter was received through the mail by one person is not proof that it had been mailed by the

defendant. In other words, to justify submission of the question of mailing by the defendant there must be evidence of that fact, direct or circumstantial."

to the same effect see United States v. Dale, 230 F. 750, Cal.

915.

It is respectfully submitted that this crucial proof that the defendants mailed or caused to be mailed the matter relied upon is not present in this case, and the lower court erred in refusing the defendants' motions for acquittal and in submitting the case to the jury.

The error in submitting the case to the jury was compounded and exaggerated by the giving by the Court of the following instruction:

"You will note that the information charges that as a part of the scheme and artifice to defraud that a letter was caused to be mailed from Las Vegas, Nevada to Phillips Petroleum Company, Kansas City, Missouri, on or about the 18th day of March, 1964. The proof in this case, as I recall it, and what it actually is, of course, is up to you, was that it wasn't a letter that was mailed, but it was a box. I instruct you that this is immaterial as long as

matter than can be mailed was mailed, and that the mailing did not happen on the 18th of March, as charged, but sometime after the 23rd, between the 23rd and the 26th, and again this is my recollection of the evidence, and the final determination is up to you. I instruct you that if you so find that there are these variances, these differences between the information and the proof, that these are immaterial variances, they are of no consequence and should not cause you any difficulty during your deliberations." (T. R. Vol. 3, p. 219)

If there was any substantial evidence that the defendants effected the use of the mails relied on for conviction, then the factual determination of the question lay within the province of the jury. It is respectfully submitted that the effect of the foregoing instruction was to remove that crucial factual issue from the consideration of the jury. The giving of this instruction was objected to by the defendants in the following language:

"MR. CLAIBORNE: We would object to the Court's giving of the instruction on variance as to the dates between March 18th and the date of mailing, March 23rd, because the date of the mailing is the

essence of the crime of mail fraud. The variance of the date was known to the Government at least by the time the information was filed, and misleads the defendants and did mislead the defendants in their defense in this matter, did not properly notify them of the charge, or any matter which would enable them to properly defend in this case. And further, that the instruction is not the law as to variance. Variance as to an offense of a few days most assuredly is of no concern, yet in this matter, it is inasmuch as the defendants were arrested prior to the mailing of the objectionable matter. That is, March 23rd, 1964, and the variance in this regard is material. Furthermore, the Court instructed the jury specifically that this objectionable matter that was mailed on March 23rd should not give them any concern in their deliberations in the jury. Thusly, the Court instructed the jury to the effect that they could disregard this variance and they may also take into consideration a variance of proof on the part of the prosecution in their deliberations and considerations, and to be told that they should pay no attention to it, we believe, is error. (T. R. Vol. 3, pp. 227-228)

THERE WAS NO EVIDENCE OF SUBSTANCE TO CONNECT THE DEFENDANTS WITH THE PERPETRATION OF A FRAUDULENT SCHEME.

The defendants respectfully submit that there was no credible, reliable or substantial evidence to connect them with the perpetration of the fraud in the unauthorized use of a credit card or in the receipt of the fruits of such fraud.

The record shows that three automobile tires and service on an automobile by unauthorized use of an oil company credit card were obtained from a Las Vegas service station. Beyond that, all that is shown is that two recalcitrant witnesses, who were impeached by the Government, made faulty and conflicting identification of one of the defendants as having been present at the filling station. All the rest of the testimony which can be looked to to support the conviction is circumstantial, and the circumstances relied on, under the authorities hereinafter set forth, are more consistent with innocence than they are with guilt.

The evidence which tends to support the conviction is hereinafter set forth:

The witness ANDERSON, who was the service station attendant who handled the credit card transaction, was asked if he recognized either of the defendants, and he responded:

"A. Yes, sir, I recognize one of them.

Q. Which one, please?

A. The one on the right.

correct?

A. Right.

MR. DE FEO: The record will show that Mr. Anderson is indicating Mr. Charles Cornet, please.

Q. (By Mr. De Feo) Now, do you recognize either of the other gentlemen at this table?

A. (By the Witness) I believe I recognize the other one, but I am not positive.

Q. Which other one is that?

A. The one on the far end.

MR. DE FEO: The record will indicate that he is indicating Mr. Rex Stidham Windom.

Q. (By Mr. De Feo) Now, you say you believe you recognize him, but you are not positive; is that correct?

A. (By the witness) That is correct, sir." (T. R. Vol. 3, p. 21).

The witness ANDERSON testified that the defendant Cornet was driving the Plymouth. Cornet wanted to know if the witness had any tires and the witness told Cornet he did, and Cornet told the witness it was a credit card purchase and the "other man" passed the credit card across to the driver who handed it to the witness (T. R. Vol. 3, p. 22). Anderson checked the credit card against the station's "hot list" and then the two men left. They were gone a few minutes and then came back with another car--the Plymouth and another car. Mr. Cornet was driving the

lymouth. The other car was a Lincoln (T. R. Vol. 3, p. 23). The witness said the Lincoln was "pinkish" but he didn't know the year of its make. "The other man" was driving it. The tires which were installed on the Lincoln were "just premium section tread, whitewall." (T. R. Vol. 3, p. 24). The witness believed" the tires were installed on the two front wheels and the left rear wheel (T. R. Vol. 3, p. 25-26). The witness was asked which individual signed the credit card slips. He responded: "I believe it was the other man, the one on the far end." (T. R. Vol. 3, p. 27)

At this juncture, the Court itself commented: "I don't know whether you are making a very good record of identification."

The Government attorney made another effort to establish the identity of the person who signed the credit card slips:

"Q. Now, you stated that the signature 'J. Box' appearing on that card is not in your handwriting; is that correct?

A. That's right, sir, it isn't.

Q. Which individual do you believe placed it thereon?

A. I believe the man on the far end." (T. R. Vol. 3, p. 28)

The Government made a still further attempt to establish the identity of the person who was driving the Lincoln automobile. To do this, he had to resort to a written statement made by an FBI agent and signed by the witness ANDERSON. Over the objection of the defendants, the Government was allowed to read a portion of the statement as follows:

"Both men left in the Plymouth and returned in about twenty minutes. The same man, whom I will refer to as number 1, was driving the Plymouth again. The other man, whom I will refer to (interruption by the Court) The other man, whom I will refer to as number 2, was driving a late model Lincoln Continental, probably a 1961 or 1962 model. It was a hardtop car and was what I call sandy pink in color." (T. R. Vol. 3, pp. 36-37)

Still struggling to establish identification, the prosecutor once again tried to get the witness to identify the defendant Windom:

"Q. (By Mr. De Feo) Now, Mr. Anderson, I'd like to ask you again with regard to the identification of the Defendants in this case, whether you are sure that Mr. Windom, the gentleman at the end of counsel table, was one of the gentlemen who came into the station that night.

A. (By the witness) I wasn't sure, no sir." (T. R. Vol. 3, p. 37)

On cross examination the witness said he did not recall specifically saying to the FBI agent that the automobile was probably a 1960 or '61 model Lincoln (T. R. Vol. 3, pp. 38-39) The witness further stated that he was not positive who signed the credit card slips--that it could have been either one of those individuals (T. R. Vol. 3, p. 41); that he was not sure

who the number 2 man was, and never was, and that he had so informed the FBI agent who took the statement (T. R. Vol. 3, p. 42). The tires all had a serial number, but the attendant did not make a note of what those serial numbers were (T. R. Vol. 3, pp. 47-48).

The Government moved to re-open direct questioning and then asked the witness who wrote down the license number "Oklahoma XW 7139" on the credit card slips. The witness said he had written it and had gotten the information from looking at the rear of the car (T. R. Vol. 3, p. 58).

Next, on redirect examination, this witness testified that his best recollection was that the "number 2 man" was the man who came into the station and signed the credit card slips. (T. R. Vol. 3, p. 59).

On recross examination the witness testified that he did not fill in the year of the license plate on the credit card slip--that it was his practice never to fill in the year--and that he had not looked to see what the year was. (T. R. Vol. 3, p. 60)

The witness LOVELAND, the other service station attendant, testified that he recognized the defendants. (T. R. Vol. 3, p. 65) He testified that the defendant Cornet produced the

credit card, but the witness didn't see where it came from (T. R. Vol. 3, p. 67). This witness said the tires were installed on a big, brown car (T. R. Vol. 3, p. 68). Throughout this witness's testimony he said he did not see who signed the credit card slips and did not know.

Over the objection of defendants, this witness, who had re-read the statement he gave to the FBI the day before giving his testimony, was allowed to read it again, in order to "refresh his memory" about what kind of a car it was that the tires were installed on. Then he "recalled" that the car was a Lincoln, but he still testified that it was "dark brown" in color. (T. R. Vol. 3, p. 77)

This witness testified that he was sure he recalled which of the two men had told him they wouldn't need a service sticker and that it was the defendant Windom. He said he didn't know which one said they wouldn't need a tire guarantee (T. R. Vol. 3, p. 75). The witness was allowed to "refresh his memory" by again reading the statement he had given to the FBI, over the defendants' objections, and then the witness testified that he saw what was in the statement, but "as I told you, just a few minutes ago, I don't know which one" told him about not needing the tire guarantee (T. R. Vol. 3, p. 78).

The Government was then allowed to read into evidence the following portions of the statement "as evidence of a best recollection recorded," over the objection of the defendants:

"I do not recall the exact name of the tires but they were Phillips brand tires and had white sidewalls and were expensive tires. They were of the size usually placed on a Lincoln automobile.

"As I recall, the number 1 man did not want a tire guarantee nor did he want a mileage sticker put on the car." (T. R. Vol. 3, p. 79).

The witness then testified that the man he had referred to as the "number 1 man" was the defendant Cornet. (T. R. Vol. 3, p. 80)

Counsel for defendants moved that the statement read into evidence be stricken on the ground the Government had been allowed to impeach its own witness. This motion was denied. (T. R. Vol. 3, p. 80)

On cross examination the witness testified that he didn't know for sure but he recalled that two tires were mounted on the driver's side and one was mounted on the other side (T. R. Vol. 3, pp. 88-89).

The witness DICKINSON testified that in 1963 he owned a '65 Lincoln four-door automobile with Oklahoma license plate number XW-7139 (T. R. Vol. 3, p. 132). He traded this automobile on February 12, 1964, to a used car lot which he identified as "Rakin Brothers Used Car Lot." (T. R. Vol. 3, p. 134). The prosecutor then continued to question him about "Raney" Brothers, located in Phoenix, Arizona (T. R.

Vol. 3, p. 134). This witness testified that he saw the defendant Windom around the car lot where he traded off his car. (T. R. Vol. 3, p. 135) He testified that he worked a brief time at this car lot and observed the defendant Windom "staying around there in the back of the garage, back there, kind of a real old house, part time." (T. R. Vol. 3, p. 136) This witness testified on cross examination that the owner of Raney Motors was Jack Raney and that he didn't know what Mr. Windom was doing at the car lot. (T. R. Vol. 3, pp. 139-140)

Finally, the witness, REGER, special agent for the FBI testified to arresting the defendant Windom at Raney's Used Car Lot in Phoenix, Arizona. He testified that at the time of the arrest a 1961 Lincoln, light pink sedan was parked on the used car lot. Defendant Windom, upon inquiry by the officers, told them that the manager of the car lot was out of town and that Mr. Windom was running the car lot. The officers asked defendant Windom if they could examine the Lincoln automobile. Defendant Windom said he had no objection. (T. R. Vol. 3, p. 144) Defendant Windom was also reported by the officer to have volunteered the statement that he had just gotten some new tires for his car. (T. R. Vol. 3, pp. 144-145) The officers examined the Lincoln looking for a service sticker, but were unable to locate any service sticker

on the car. They saw three practically new Phillips 66 tires on the Lincoln, and the writing on the tires indicated that they were premium action tread, low profile, white sidewall nylon tubeless four-ply tires and the size was 900-950 by 14. (T. R. Vol. 3, p. 145) After defendant Windom had been taken to the Marshal's office, he said the Lincoln which the officers had seen on the lot had been signed over by him, the title had been signed over by him to Mr. Raney prior to his most recent trip to Las Vegas, Nevada. (T. R. Vol. 3, p. 145)

On cross examination it was brought out that when Mr. Windom stated "I have just got some new tires for my car" he didn't point at the Lincoln and he didn't tell the officers what automobile he had reference to. Someone from the FBI office did verify the fact that the automobile did belong to Mr. Raney. The Lincoln had Arizona dealers license plate number 7199. (T. R. Vol. 3, p. 148-149)

The foregoing recitation of the of the testimony is somewhat lengthy, but every effort has been made to extract from the record everything that the Government can rely upon to support the conviction.

When this evidence is sifted down, all that remains is partial and contradictory identification of the defendant Cornet having been at the service station. A great

Effort was made by the Government to identify the defendants, even to the extent that the Government was allowed to impeach both of the service station attendants on the basis of statements written out by FBI agents and signed by these witnesses.

A great effort was also made, without success, to connect the defendant Cornet with a pink Lincoln Continental automobile and the circumstance that there was a pink Lincoln at the used car lot where the defendant was arrested which had three Phillips 66 tires on it.

Despite all this effort, however, we are dealing here with a case in which there were multiple means of establishing identity of the perpetrators of the fraud at the disposal of the Government. The means of identification by fingerprints on the crucial credit card slips (and it appeared this means was unsatisfactorily employed, since the exhibits were blurred and the testimony was that they were not blurred when they were received in Kansas City (T. R. Vol. 3, p. 118); the means of identification by handwriting analysis to show who wrote the name "J. Box"; establishing the tires on the Lincoln Continental were those sold at Saveway Station 15 by use of the serial number on the tires; and finally, establishing who owned the Lincoln at the time of the occurrence charged, although here again it appears this would not have helped the Government, as the investigation officer Reger

testified someone at his office verified the fact that a Mr. Maney owned the automobile at the time of the arrest.

The defendants respectfully submit that the foregoing evidence simply does not constitute substantial proof identifying the defendants as the perpetrators of the acts charged, and the lower court erred in refusing to grant the defendants' motion for acquittal and in refusing to grant the defendants' motion for a new trial.

The following cases are comparable to the case on this appeal. While each case must turn on its own facts, the failure of the witnesses to make credible identification of the defendants as to the persons at the service station, and the inadequacy of the circumstantial proof relied on to trace the fruits of the fraud into the hands of the defendant, come clearly within the rules of these cases and require the reversal of the convictions of the defendants.

People v. Widmayer, 1948, 402 Ill. 143, 83 N.E. 2d 285;

Johnson v. State, Tex. Crim. App., 1950, 235 S.W.2d 180;

State v. Bradley, 1954, 267 Wis. 87, 64 N.W.2d 187;

State v. Hampton, Mo. 1955, 275 S.W.2d 356.

POINT FOUR

BY REASON OF THE MISCONDUCT OF THE UNITED STATES ATTORNEY IN THE MAKING OF HIS CLOSING ARGUMENT TO THE JURY, THE COURTS REFUSAL TO DECLARE A MISTRIAL,

AND BY REASON OF THE REFUSAL OF THE LOWER COURT TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANTS' REQUESTED INSTRUCTION NO.8, THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL.

During the closing argument of the Government, it was several times objected that the Government's attorney argued to the Jury matters which were not in evidence or misstated the evidence to the jury:

Specifically, the United States Attorney argued to the jury facts not in evidence that the Government's handwriting expert couldn't possibly say that defendant Windom wrote the signature "J. Box" because only four letters appear in the signature. (T. R. Vol. 3, p. 198-199) There was no testimony whatever to support this statement. Secondly, the United States Attorney stated in his argument that no fingerprints would appear on the credit card slip because of the manner in which the slip would be handed to the customer. (T. R. Vol. 3, p. 200) Next, the United States Attorney challenged the "seriousness" of the contentions of the defense on the ground the two exhibits consisting of signatures of the name "J. Box" were taken from each of the service station attendants while they were on the stand, and the defendants rested without putting

these exhibits in evidence. (T. R. Vol. 3, p. 201) Next, the jury was told that if the defense was serious in its contention concerning the fact the serial numbers of the tires were not placed in evidence, that counsel for the defendants could have demanded from the witness Bailey, or the FBI agent the serial numbers in question. (T. R. Vol. 3, p. 203)

At the conclusion of this closing argument, the prosecutor finally stated "(This case) was brought because the Government honestly believes the defendants are guilty and deserved to be punished . . ." (T. R. Vol. 3, p. 206)

At the end of the argument the defendants moved for a mistrial on the ground of misconduct on the part of the United States Attorney in his argument. (T. R. Vol. 3, p. 206) The motion was denied.

The closing argument is of such a length that it cannot be set forth herein, but the defendants respectfully request that the members of this court read the same in its entirety, together with the record of objections and argument made by the defendants before the lower court at the time of trial and on argument of their motion for a new trial. (T.R.Vol.4)

Following the argument, the defendants submitted their proposed instruction No. 8 to the Court:

"You are instructed that you may have the testimony of any witness read to you upon your request, if there

is conflict in your minds as to what any witness may have testified to during the trial."

the instruction was refused by the court which stated:

"THE COURT: I have rejected Defendants' proposed Instruction 8, first, because it is presented too late, presented for the first time after the close of argument, and secondly because I think it would tend to encourage the jury to ask that certain testimony be read back."

The defendants made the following objection to the refusal of the court to give proposed Instruction No. 8:

"We object to the Court's failure to give Instruction Number 8 on the following grounds: The United States Attorney has flagrantly intentionally and with total disregard of the constitutional rights of these Defendants, misquoted the evidence, not unintentionally, and not by error or oversight, on three separate occasions. This we maintain was, as I said, not unintentional or not just error on his part, but a deliberate calculated planned attempt on his part to misquote evidence to the prejudice of these Defendants, which we think is reprehensible. We think it is not only grounds for a mistrial of this matter, we think this jury should have been instructed and this

Instruction Number 8 given, instructing them that they have the right to have any testimony where there was a conflict in their minds as to what the witness said read back to them. In this case it is a necessity, because they still do not know, as they sit there in the jury box, who was telling the truth. They may believe every word that Mr. De Feo said in his misquotation of the evidence, and accept his word because he is an officer of the Government. They are very likely to accept his word, as he well knew, or otherwise he wouldn't have made the remarks.

Furthermore, they were made at a time in his closing summation when it was impossible for counsel to answer them, which further leaves the impression with the jury at this time that since he is an officer of the Government and they were not answered, that they must be -- his version must be true, so we believe that inasmuch as these sharp conflicts between his argument as to what the evidence was and mine, this jury should be so advised."

After the making of the objection the Court indicated for the record a further ground for rejecting the instruction:

"THE COURT: Before you go on to another objection, counsel, I'd like to further indicate for the record, I'd like to indicate for the record a further ground for rejecting

Defendants' proposed 8; that insofar as the ground just stated by Mr. Claiborne, Mr. Claiborne himself, in his closing argument, touched on many matters outside of the record and it would have been proper for the Government counsel to have objected and I would have sustained such objection but Government's counsel apparently preferred to meet fire with fire and then also went outside the record in his closing argument, but under the circumstances, considering the arguments of both Defense counsel and the closing argument of Government's counsel, I see no error and I saw no grounds for a mistrial and I see no reason for calling to the jury's attention particularly the fact that they would have the right to have testimony, or part of it, read back to them by the court reporter."

to the timeliness of the tendering of the instruction, the Defendant pointed out to the Court that the instruction was not tendered prior to the arguments because counsel for the defendants did not and could not anticipate misconduct on the part of the United States Attorney.

The error was argued to the Court again at the hearing on the defendants' motion for a new trial (T. R. Vol. , pp. 5-9) and again the application for a trial free from

prejudicial misconduct of the Government's attorney was denied.
(T. R. Vol. 4, p. 9)

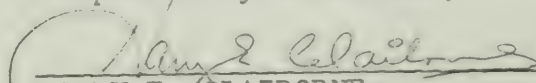
It is contended by the defendants that they were deprived of a fair and impartial trial by reason of the misconduct of the United States Attorney in his closing argument to the jury. It is also contended that the trial court committed reversible error in refusing to instruct the jury in accordance with the Defendant's Proposed Instruction No. 8.

The cases of State vs Teeter, 1948, 65 Nev. 584, 200 Pac 2d 657; Benham v. United States, CA 5th, 1954, 215 F.2d 472, and Wagner v. United States, CA 5th, 1959, 263 F.2d 877, are illustrative of the standard of conduct to which a Prosecuting Attorney is held in a criminal prosecution and the necessity of according the defendants a trial which is free from the misconduct of the prosecutor in his argument to the jury.

CONCLUSION

On the basis of the errors hereinabove set forth, and under the controlling authorities, it is respectfully submitted that the conviction of the defendants must be reversed and the case dismissed, or in the alternative, that the defendants be accorded a new trial free from error.

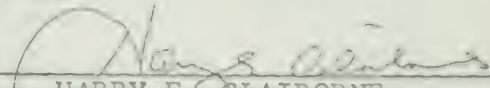
Respectfully submitted,


HARRY E. CLAIBORNE

CERTIFICATE:

-oOo-

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.


HARRY E. CLAIBORNE
108 South Third Street
Las Vegas, Nevada
Attorney for Appellants

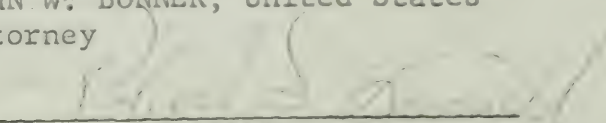
STIPULATION AND PROOF OF SERVICE

-oOo-

IT IS HEREBY STIPULATED by and between counsel for the parties hereto that three copies of the Appellants' Opening Brief have been received by the undersigned Attorney for the United States, and that he expressly waives objection to the filing of the foregoing brief in the said court after the date of January 1, 1966, and stipulates that the same may be timely filed upon receipt thereof by the Clerk of the said Court.


HARRY E. CLAIBORNE
Attorney for Appellant

JOHN W. BONNER, United States
Attorney

By: 
ROBERT S. LINNELL

AN ACT to amend chapter 205 of NRS, relating to crimes against property, by adding a new section defining terms, prohibiting theft, forgery, alteration, counterfeiting, circulation or sale of stolen credit cards and fraudulent use of revoked or canceled credit cards, and providing penalties; and providing other matters properly relating thereto.

[Approved March 2, 1966]

*The People of the State of Nevada, represented in Senate and Assembly,
do enact as follows:*

SECTION 1. Chapter 205 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. As used in this section:

(a) "Cardholder" means the person or organization to whom a credit card is issued or for whose benefit it is issued.

(b) "Credit card" means any instrument, whether in the form of a card, booklet, plastic or metal substance, or the number or other identifying description thereof, which is sold, issued or otherwise distributed by a business organization or financial institution, for the use by the person or organization named thereon for obtaining on credit goods, property, services or anything of value.

2. Any person who:

(a) Steals, takes or removes a credit card from the person or possession of the cardholder, or who retains or secretes a credit card without the consent of the cardholder, with the intent of using, delivering, circulating or selling or causing such card to be used, delivered, circulated or sold without the consent of the cardholder, is guilty of a misdemeanor.

(b) Has in his possession or under his control or who receives from another person any forged, altered, counterfeited, fictitious or stolen credit card with the intent to use, deliver, circulate or sell it, or to permit or cause or procure it to be used, delivered, circulated or sold, knowing it to be forged, altered, counterfeited, fictitious or stolen, or who has or keeps in his possession any blank or unfinished credit card made in the form or similitude of any credit card, with such intent, is guilty of a misdemeanor.

(c) Has in his possession, or under his control, or who receives from another person a credit card with the intent to circulate or sell it, or to permit or cause or procure it to be used, delivered, circulated or sold, knowing such possession, control or receipt to be without the consent of the cardholder or issuer, is guilty of a misdemeanor.

(d) Delivers, circulates or sells a credit card which was obtained or is held by such person under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, or permits or causes or procures to be used, delivered, circulated or sold, knowing it to be obtained or held under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, is guilty of a misdemeanor.

(e) With intent to defraud, either forges, materially alters or counterfeits a credit card is guilty of a felony.

(f) Knowingly uses or attempts to use for the purposes of obtaining goods, property, services or anything of value a credit card which was obtained or is held by the user, under circumstances which would constitute a crime under paragraphs (a), (b) or (c) of this subsection, is also guilty of a misdemeanor if the total amount of goods, property or services or other things of value so obtained by such person does not exceed \$100, or is also guilty of a felony if the total amount of goods, property or services or other things of value so obtained by such person exceeds \$100.

3. Every person who knowingly and with intent to defraud uses for the purpose of obtaining goods, property or services, or anything of value, a credit card which has been revoked or canceled by the issuer thereof (as distinguished from expired), and notice of such revocation or cancellation has been given to such person, is guilty of a misdemeanor if the total amount of goods, property or services or other things of value so obtained thereafter by such person does not exceed \$100; and is guilty of a felony if the total amount of goods, property or services or other things of value so obtained thereafter by such person exceeds \$100.

SEC. 2. This act shall become effective upon passage and approval.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES CORNET and
REX STIDHAM WINDOM, JR.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

HARRY E. CLAIBORNE
and
ANNETTE R. QUINTANA
108 South Third Street
Las Vegas, Nevada
ATTORNEYS FOR APPELLANTS

TOPICAL INDEX:

-oOo-

Page

POINT ONE: The Conviction of the Defendants for Mail Fraud violates the Tenth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution because the Defendants did not mail or knowingly cause to be mailed, any matter for the purpose of executing a fraudulent scheme	1
POINT TWO: There is no substantial evidence that the Defendants used the mails or knowingly caused the mails to be used	13
POINT THREE: There was no evidence of substance to connect the defendants with the perpetration of a fraudulent scheme	18
POINT FOUR: By reason of the misconduct of the United States Attorney in the making of his closing argument to the jury, the court's refusal to declare a mistrial, and the refusal of the lower court to instruct the jury in accordance with defendants' requested instruction No. 8, defendants are entitled to a new trial	23
CONCLUSION	29
CERTIFICATE	30
STIPULATION AND PROOF OF SERVICE	31

TABLE OF CASES

PAGE

Adams v. United States, CA 5th, 1963, 312 F.2d 137	5
Bauman v. United States, CA 5th, 1946, 156 F.2d 534	7
Dyhre v. Hydspeth, 106 F.2d 286	6
Greenberg v. United States, CA 1st, 1960, 280 F.2d 472 . .	28
Johnson v. United States, CADC 1965, 347 F.2d 803	26
Kann v. United States, 1944, 323 U.S. 88, 65 S.Ct. 148, 802 Ed 88	3
Larn v. United States, CA 9th, 1946, 158 F. 2d 568	23
Loian v. United States, CA 5th, 1965, 349 F.2d 291	5 - 9
Mowden v. United States, CA 5th, 149 F. 673	25
Moyer v. United States, CA 9th, 1935, 78 F.2d 624	26
Mowlin v. United States, CA 10th, 1964, 328 F.2d 262	17
Marr v. United States, 363 U.S. 370, 80 S. Ct. 1171	10
Maliaferro v. United States, CA 9th, 1931, 47 F.2d 699	24
United States v. Gardner, CA7th, 1948, 171 Fed. 2d 753	14
United States v. Lowe, CA 7th, 1940, 115 F.2d 596, (Cert. Den. 311 U.S. 717, 61 S. Ct. 441, 85 L.Ed 466	6
United States v. Molin, 244 F. Supp. 1015	28
United States v. Toscano, CA 2d 1948, 166 F.2d 524	26
United States v. Wapnick, D.C.E.D. NY. 1962, 202 F. Supp. 712	21
Wagner v. United States, 1959 CA 5th, 263 F.2d 877	27

IN THE UNITED STATES COURT OF APPEALS, FOR THE
NINTH CIRCUIT

CHARLES CHARLES CORNET and)
)
REX STIDHAM WINDOM, JR.,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)

APPELLANT'S REPLY BRIEF

POINT ONE

THE CONVICTION OF THE DEFENDANTS FOR MAIL FRAUD
VIOLATES THE TENTH AMENDMENT AND THE DUE PROCESS
CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED
STATES CONSTITUTION BECAUSE THE DEFENDANTS DID
NOT MAIL OR KNOWINGLY CAUSE TO BE MAILED, ANY
MATTER FOR THE PURPOSE OF EXECUTING A FRAUDULENT
SCHEME.

The Government's Answer Brief follows
the procedure of dealing spearately with Appellants' specifi-
cations of error, rather than responding to the propositions

set forth in the Appellants' separate points of argument. Under this point, therefore, Appellants are specifically replying to the matter contained in Division 1 of the Government's argument (pages 3-4, Answer Brief) and Division 5 (pages 18-22, Answer Brief.)

In support of the action of the lower court in refusing to dismiss the Criminal Information as one showing on its face that no use of the mails occurred until after the fruition and completion of the alleged fraudulent scheme, the Government relies upon the charge in the Information that the victims of the alleged fraudulent scheme were Phillips Petroleum Company, Inc. and Allied Oklahoma Corporation. This charge, however, is limited to and directly contradicted by the allegations in the remainder of the Information, which specify that the object of the scheme was on or about March 12, 1964 to "order and receive three tires for a Lincoln Continental, of a value of approximately \$150.00, and service to the automobile of a value of approximately \$22.55, from an attendant at the Saveway 15, a Phillips 66 Gasoline Service Station, 929 Las Vegas Boulevard South, Las Vegas, Nevada." Toward the end of the Information, in paragraph 7, the Government charged that it was a part of the scheme that on or about March 18, 1964, the credit

card slips would be forwarded in the ordinary course of business by mail from Las Vegas, Nevada, to Phillips Petroleum Company, Inc., Kansas City, Missouri.

This allegation also, in the face of the limited nature of the fraudulent scheme charged, is not borne out by the description of the scheme charged, but is instead contradicted on the face of the Information.

In the case of Kann v. United States, 1944, 323 U.S. 88, 65 S. Ct. 148, 892 Ed 88, it was charged that the defendants intended to defraud Triumph Explosives, Inc., and its stockholders by diverting part of the profits of Triumph on Government contracts to a corporation known as Elk Mills Loading Corporation whereby Elk Mills would then distribute the profits in the form of salaries, dividends and bonuses, and that the defendants caused a check drawn on Elk Mills to be delivered by mail a check drawn by one Jackson on a Delaware trust company.

In Kann, from the language of the opinion, the indictment did not show on its face that the scheme had been completed before the mailing took place, as in the present case. Here the dismissal of the case was based upon the proof at the trial, where it was established that when the check was cashed at the local bank, the defendants had received the moneys it was intended they should receive under the scheme, and subsequent

mailings of the checks were merely incidental and collateral to the fraudulent scheme and not a part of it.

In Kann, also, it was argued that the scheme was not complete until the checks had been cleared in the ordinary course of business, which would require mailing to and payment by the drawee bank, but this argument was rejected. The court pointed out that the scheme had reached fruition before any mailing, that it was immaterial to the defendants how the bank which paid or credited the check would collect from the drawee bank. The court distinguished cases where the mails are used as one step toward the receipt of the fruits of the fraud, or cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated, and pointed out that "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The ultimate victims of the fraud in Kann were the Triumph corporation and its stockholders, but this fact did not serve to enlarge the fraudulent scheme or prolong its execution, which was completed as soon as the local bank cashed the Elk Mills checks.

That is the situation here. The Information shows on its face that the obtaining of the tires and servicing of the automobile was a mere local matter, wholly completed before any use of the mails occurred. The Information does not allege facts which show that anything further remained to be done in the execution of the scheme after the tires and service were obtained in Las Vegas, Nevada, it does not allege that the scheme encompassed any further acquisitions by fraud, or that any use of the mails was made in order to escape detection.

The scheme charged in the Information was completed once the tires and service had been obtained in Las Vegas, and this is not a "tacit assumption" of appellants -- it is manifestly described in the factual allegations of the Information.

The cases relied on by the Government:

Adams v. United States, CA 5th, 1963, 312 F.2d 137, and Kloian v. United States, CA 5th, 1965, 349 F.2d 291, both involved fraudulent schemes encompassing more than a single transaction. In Adams, the Indictment alleged a scheme involving the mailing of "various sales slips" and the proof was that the defendant used the credit card for several months and made some 200 purchases from Gulf distributors in several states, in the total amount of

1953.55. The holding of Adams is simply that the execution of the fraudulent scheme involved an extension of credit, which contemplated the utilization of a commercial practice including the use of the mails. The case cited as the precedent for this holding is United States v. Lowe, CA 7th, 1940, 115 F.2d 596, 9th Cir. Den., 311 U.S. 717, 61 S.Ct. 441, 85 L.Ed. 466) which involved a check-kiting scheme and the direct dealing of the defendant with two banks and the necessity of relying upon a delay in time for forwarding a deposited check until payment was received by the bank on which the check was drawn to afford the defendant an opportunity to use or exhaust a credit to his account of \$4,000.00. That decision in turn goes to great length to distinguish the case of Dybre v. Hydspeth, 106 F.2d 286, on the ground that case involved a scheme of inducing merchants to accept fraudulent checks for merchandise, and did not establish a scheme to set up a line of credit for future use.

The decision in Adams gives as an additional ground for its holding the proof of the allegation in the Indictment that the intended victims of the fraud were not only Gulf distributors, but Gulf Oil Company itself and the rightful owner of the credit card, and the scheme contemplated forwarding of the sales slips by mail for ultimate payment by them. Finally, in Adams,

the court referred to the delay in detection afforded by the use of the mails which permitted the defendant to expand the scope of his operations and concluded: "Thus, when the scheme is viewed in its entirety, it is obvious that the use of the mails constituted a part of it."

Adams relies on Bauman v. United States, 155 F.2d 534, 1946, which also involved multiple transactions constituting reliance upon the delay in discovery of the forgeries of the checks which would result from the use of the mails. In Bauman, the petitioner sought release on habeas corpus for failure of the Indictment (to which he had plead guilty) to charge a Federal offense, on the ground the Indictment showed on its face that the mailing of the check was after the completion of the fraudulent scheme. The court noted that no one count in the indictment described a fraudulent scheme that began at a certain date and continued to a later date, but the Indictment did allege a series of transactions on different dates outlining a course of conduct that delay in discovery of the fraud, by reason of the use of the mails, would aid. The court pointed out that the Indictment alleged that the defendant intended to defraud the business organization whose name he had forged to the check, not merely the local hotel that had cashed the check. In the course of the opinion the Court reasoned that it was difficult to see how the defendant could have intended to defraud the concern against which he was forging checks unless the checks were trans-

count was kept. In Bauman, the court said:

" The defendant pleaded guilty to an indictment which alleged that he was intending to defraud the concern whose name he had forged to the check and not merely that he had intended to defraud the hotel that had cashed the check. He pleaded guilty to an indictment that said the mailing of the check was in and for executing the scheme and artifice. These allegations were not denied but were admitted, and we think that the Court had jurisdiction of the offense."

In Adams, the court said:

" The conviction must be affirmed for another reason. The Indictment alleged, and the evidence established, in our opinion, that appellant devised a scheme to defraud, not only the various Gulf distributors, but also the Gulf Oil Company and Magie. Appellant could not have intended to defraud either Gulf or Magie except by having the sales slips transmitted in the usual course by mail x x x."

In both Bauman and Adams, schemes embracing many separate transactions, and requiring a delay in detection, were alleged in the Indictment. In Bauman the defendant plead guilty to this charge and the further charge that the mailings were in aid for the execution of the scheme. In Adams the court said the

evidence established a scheme to defraud the oil company and the credit card owner.

Neither of these cases stands for the proposition that a bare allegation of intent to defraud an ultimate victim is sufficient to invoke federal criminal jurisdiction over a fraudulent scheme which is specifically restricted to a single transaction of obtaining merchandise by a fraud practiced on a local service station, calling neither for the use of credit over a period of time, or a delay in detection of the scheme to be occasioned by use of the mails.

The pole star in this matter is the language of the statute, (18 U.S.C., Sec. 1341), which requires that the use of the mails, on which fact federal jurisdiction is posited, be "for the purpose of executing such scheme or artifice or attempting so to do."

The defendants did not plead guilty here, and it was incumbent on the Government to both allege and prove use of the mails for the purpose of executing a fraudulent scheme. This is not accomplished by an allegation of a single local transaction."

The case of Kloian v. United States, CA 5th, 1965, 349 F.2d 291 does not support the argument of the Government either. In that case, also, the defendant had entered a guilty plea, and he brought an action for post-

conviction relief on the ground that the information did not charge an offense. The court noted that the question in these cases centers on whether the use of the mails is an integral and material part of the scheme as planned and executed, or whether the scheme was independent of the use of the mail. The court pointed out that the indictment alleged a scheme to defraud the oil company and credit card owner, as well as the distributors of the oil company products. To which, of course, the plea of guilty applied.) It further pointed out:

" . . . In Adams, three separate purchases were charged in the execution of the scheme. Each allegedly caused the mailing of the purchase invoices to the oil company. Here two separate purchases with attendant mailings were charges. In Adams, the purchases were spread over a period of slightly more than a month. Here they were over a period of approximately two weeks."

The cases of Kann and Parr v. United States, 363, U.S. 370, 80 S.Ct. 1171, are clear examples that it is not every misuse of a commercial credit card which will establish a scheme which has the use of the mails as an integral and material part of the scheme as planned and executed. If it is obvious from the allegations in the Information that the scheme is complete before any use of the mails occurs, no federal offense is charged.

Moreover, if it is alleged that the ultimate victim was intended to be defrauded by a scheme which necessarily involved use of the mails, the charge must either be admitted by the defendant, or proved against him by the Government. There is neither admission nor proof in the instant case.

The only shred of testimony offered by the Government to show proof of such intention, or use, is the testimony of the witness Stratham that Phillips Petroleum Company sustained a bad debt loss on the transaction. (Answer Brief, page 19). In this connection, the Government did not prove by this witness (or any other) where the responsibility of loss would normally fall. The record does show that on March 18, 1964, the witness Stratham was informed by a phone call from Mr. Smith, an F.B.I. agent in Kansas City, that the credit card was being misused. (T.R. Vol. 3, p. 127) This was known five full days before any use of the mails occurred on March 23, 1964, (T. R. Vol. 3, p. 115), so how can it possibly be said that the use of the mails was "an integral and material part of the scheme as planned and executed?"

In Kann it was pointed out that when the fraudulent checks were cashed at the local bank, the defendants received the moneys it was intended they should receive under the scheme. The local bank became the owner of the check, and was

entitled to collect from the drawee bank, and the drawer had no
liability to payment. "The scheme in each case had reached fruition.
The persons intended to receive the money had received it ir-
revocably. It was immaterial to them, or to any consummation
of the scheme, how the bank which paid or credited the check
would collect from the drawee bank. It cannot be said that the
billings in question were for the purpose of executing the scheme
as the statute requires."

So it is in the instant case. Phillips
Petroleum Company took the loss on the transaction after having
notice of the fraud five full days before any use of the mails
occurred. Either its liability for the loss was complete before
any use of the mails occurred, or else it was a voluntary loser
and a voluntary loss was certainly no part of the fraudulent scheme
alleged.

The information showed, on its face, that
no Federal crime was stated, and the Appellants were put to trial
on a violation of the Tenth and Fourteenth Amendments to the United
States Constitution. There was no proof at the trial that a
Federal offense was committed in the fraudulent use of the mails,
and the defendants were wrongfully convicted.

POINT TWO

THERE IS NO SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS USED THE MAILS OR KNOWINGLY CAUSED THE MAILS TO BE USED.

The Answer Brief acknowledges the contention of the Appellants that the mailing relied upon was actually caused by the F.B.I., for the purpose of prosecuting the defendants. (Answer Brief, page 18).

The Government has not controverted the facts established by the record as to this matter, or disputed the correctness of the authorities relied upon by the Appellants in their Opening Brief.

The Government says, merely, that Appellants' contention is based upon the assumption that the scheme to defraud was completed before any use of the mails took place, that Phillips Petroleum Company was the victim of the fraudulent scheme, and that the natural and probable consequence of the acts of Appellants was the forwarding of the credit card slips to Phillips by mail, which the defendants are "presumed" to have intended.

The fatal flaw in this argument is that the act of mailing, either by a direct deposit of matter in the mails, or indirectly through a series of circumstances set in motion by the accused, is an element of the crime charged.

Where, as in this case, that mailing is actually accomplished by federal agents in order to make out a case for federal prosecution, or even by the person initially defrauded, having knowledge of the fraud before the mailing, the person so accused is not responsible directly or indirectly for such mailing.

This was the holding in United States v. Gardner, CA 7th, 1948, 171 F.2d 753. That case arose on indictments for causing a stolen motor vehicle and forged and counterfeited checks to be transported in interstate commerce. The proof was that on the day one Chenoweth took the spurious checks in exchange for the automobile, he was advised that he had been "hooked" and took the checks to the police department who telephoned the president of the bank on which the checks were purported to be drawn, and from whom was received the definite information that the checks were forged on spurious. Chenoweth learned on the day he took the checks that they were forgeries. The car he had turned over to the persons who had defrauded him was recovered three days later and returned to Chenoweth two days after its recovery. Then Chenoweth presented the checks to the Richmond bank two days after the car had been returned to him, and in due course they were forwarded for payment to the bank in Chicago. Chenoweth testified that he deposited the checks in the Richmond bank "for the purpose of making a case from the federal standpoint."

On this circumstance the court said:

". . . While we are referred to no case directly in point, we are of the view that the checks came to rest insofar as interstate commerce is concerned when Chenoweth learned that they were forgeries. It has been held that a stolen motor vehicle recovered before it crosses a state line will not support a charge for its transportation in interstate commerce, knowing it to have been stolen. Hill v. Sanford, 5 Cir., 131 F.2d 417, 418. And it has been held, 'The act does not purport to exercise jurisdiction over individuals who receive or sell stolen cars after such cars cease to move in or be a part of interstate commerce.' Davidson et al. v. United States, 8 Cir., 61 F.2d 250, 255. We think the instant situation is analogous and that the Act upon which this cause is predicated does not embrace the factual situation of the instant case.

The Government relies upon the recent case of United States v. Sheridan, 329 U.S. 379, 67 S.Ct. 332, 91 L.Ed. 359. That case is readily distinguishable. There, it was the defendant who took the forged checks to a bank and cashed them; he did so knowing that the bank would transport them in interstate commerce, and

from a reading of the opinion it may be presumed that the bank had no knowledge that a fraud was being perpetrated upon it. It was in connection with that situation that the court, 329 U.S. at page 391, 67 S.Ct. at page 338, made the statement upon which the government relies: 'One who induces another to do exactly what he intends, and does so by defrauding him, hardly can be held not to 'cause' what is so done.' Here, it was not the forger who induced Chenoweth to present the forged checks to the bank, and by no stretch of the imagination can it be said to have been the defendant Gardner. Many days before Chenoweth presented the checks to the Richmond bank the fraud on him had been perpetrated. We are strongly of the view that the Act does not contemplate that a person who has been knowingly defrauded in such manner may step into the shoes of the offender and cause the forged instruments to be placed in interstate commerce for any purpose, much less that 'of making a case from the federal standpoint.'

The authority of the decision in Gardner has never been diminished or departed from in all of the cases referred to in Shepard's Citator. In most of them, the doctrine was not applicable because

there was proof only that the act of transporting the instruments in interstate commerce was done by one who merely suspected that the instrument was false or forged, but did not have knowledge of such fact. Typical of these decisions is the case of Nowlin v. United States, CA 10th, 1964, 328 F.2d 262. There the court said:

" . . . To apply the rule of law laid down in United States v. Gardner, supra, the evidence must show that the bank had absolute 'knowledge' of the forgeries, and, with this knowledge mailed the forged checks through interstate commerce for payment in order to incriminate the appellant and his co-defendant. The Denver bank, however, had mere suspicions of the forgeries, which is not tantamount to knowledge. There is a wide disparity between 'suspicion' and 'knowledge'.

In the present case, the facts of the knowledge of the misuse of the credit card on the part of the local service station and the officials of Phillips Petroleum Company, together with the circumstances surrounding the mailing of the sales slips, described in full in the Opening Brief of appellants, bring this case squarely under the doctrine of Gardner.

THERE WAS NO EVIDENCE OF SUBSTANCE TO CONNECT THE DEFENDANTS WITH THE PERPETRATION OF A FRAUDULENT SCHEME.

The following items are relied on by the Government to identify the appellants and connect them with the crime charged:

1. Identification of the defendant Cornet by the service station attendant, Anderson, who drove another passenger into the station, who produced a credit card and gave it to the attendant.

When this witness was asked if he recognized either of the defendants seated in the courtroom, the witness testified that he recognized one of them -- the defendant Cornet. He was then asked if he recognized the other one (defendant Windom) and the witness stated "I believe I recognize the other one, but I am not positive. (T. R., Vol. 3, p. 21) The Government took another stab at trying to establish the identity of the defendant Windom and asked this witness whether he was sure that Mr. Windom was one of the gentlemen who came into the station that night. The witness answered, "I wasn't sure, no sir." (T. R. Vol. 3, p. 37) This witness never gave any stronger testimony than this on the point. (T. R. Vol. 3, pp. 41-42; 51; 59; 62-63).

2. Another filling station attendant, Loveland, testified he had met the defendants at the station (T. R. Vol. 3, pp. 64-65). Despite the early certainty of this witness that he

recognized both defendants, the course of his testimony in full showed him to falter so badly over most of the circumstances involved, that over the objection of the defendants, the Government was finally permitted to try to establish identity by reading into evidence the written account made by an agent of the F.B.I. following an interview with the witness shortly after the event. Even this was not sufficient to re-establish any credibility to the witness' testimony, as described at pages 47-49 of Appellant's Opening Brief.

3. The car had Oklahoma license plates bearing a certain number which Anderson said he recorded on the credit card sales slip, but he did not record the year of the license plates. (T. R. Vol. 3, page 58)

4. A witness appeared from Oklahoma who had had a car like the car in question with an Oklahoma license plate bearing the same number, issued in the year 1963. He testified he traded the car in to "Rakin Brothers Used Car Lot." (T. R. Vol. 3, p. 134.) Thereafter this witness was continuously questioned about "Raney Brothers Used Car Lot" which he located in Phoenix, Arizona. (T. R. Vol. 3, pp. 134-137) He testified he had seen the defendant Windom (whose name the witness could not recall) around the car lot when he traded his car off; that he had worked at that car lot for a couple of weeks as a mechanic, and that the defendant Windom was "staying around there in the back of the garage, back there, end of a real old house, part time." He never saw the license

plate on his car after he traded it in to the lot. (T. R. Vol. 3, 134-136) His automobile was a 1955 two-tone green Lincoln. (T. R. Vol. 3, pp 137-138) A license plate purchased in the early months of 1964, would not be identified as a 1963 plate (T.R. Vol. 3, p. 139) as new plates are purchased in Oklahoma every year. He did not know what the Defendant Windom was doing at the car lot -- he believed he was associated in some way with Mr. Raney. (T. R. Vol. 3, p. 140)

5. The testimony concerning the arrest of the defendant Windom at Raney's Used Car Lot in Phoenix, Arizona, was, in substance that there was a 1961 pink Lincoln sedan on the lot which had three new Phillips tires mounted on its wheels. It was never established that Windom had any connection with this Lincoln.

The Government rightfully characterizes this evidence as being partially direct and partially circumstantial. (Answer Brief, p. 8) The government's summation of the evidence relied on establishes that although the defendant Cornet was identified by both service station attendants, there was no proof whatever that he had knowledge of any fraudulent scheme or that he did anything more than serve as an inquirer for a man never certainly identified. There was testimony that before the event at the service station the defendant Windom was

at or near a car lot where there was a car with a 1963 Oklahoma license plate of the same number as that on the pink Lincoln, but the year of the license plate was never established. Three new Phillips tires were discovered on a pink Lincoln at the car lot, but the license plate was that of an Arizona Dealers License of a different number from that on the car in question. The defendant Windom is reported to have said he had at an earlier date traded the title to the pink Lincoln seen on the used car lot over to Mr. Raney before the defendant Windom's most recent trip to Las Vegas. There was no proof connecting the defendant Windom to the ownership of the pink Lincoln at the car lot, or at the filling station. The tires on the car in the lot were like those obtained at the service station, but although they had serial numbers, no positive identification was made, and the failure to make it was not explained by the Government.

This proof is simply not sufficient to identify the defendants and connect them with the commission of the acts charged against them.

It was rightly said in the case of United States v. Wapnick, D. C. E.D. NY. 1962, 202 F. Supp. 712, that "substantial evidence" means more than a synthesis of a chain of inferences from equivocal facts," and the evidence in that case did not

meet the test for proof of criminal guilt. *Nosowitz v. United States*, 2 Cir., 1922, 282 F. 575; *United States v. Gardner*, 7 Cir., 1948, 171 F.2d 753.

The test referred to is whether viewing the evidence in the light most favorable to the Government, there is substantial evidence to establish the defendant's guilt. The decision notes that this test is less stringent than that employed in the Ninth Circuit (*Elwert v. United States*, CA 9th, 1956, 231 F.2d 928, 933) where in passing on a motion for acquittal the judge determines whether or not, viewing the evidence and inferences fairly flowing therefrom in the light most favorable to the Government, a reasonable mind might fairly conclude the defendant was guilty beyond a reasonable doubt.

See also:

United States v. Gardner (supra) CA 7th, 1948, 171 F. 2d 753, where a purported identification of the defendant, and an effort to connect him with the commission of a crime are strikingly similar to the present case, and where it was held there was not sufficient evidence to sustain the verdict.

Compare the circumstances with those in *State v. Seal, N.M.*, 1965, 209 Pac. 2d. 128, where it was held that a similarity of footprints, tire prints, the locations of the defendant and his actions and statements created a suspicion

hat he committed the offense charged, but did not constitute substantial evidence to support the conviction.

See also: Karn v. United States, CA 9th, 1946,

58 F.2d 568

POINT FOUR

BY REASON OF THE MISCONDUCT OF THE UNITED STATES ATTORNEY IN THE MAKING OF HIS CLOSING ARGUMENT TO THE JURY, THE COURT'S REFUSAL TO DECLARE A MISTRIAL, AND THE REFUSAL OF THE LOWER COURT TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO.8 DEFENDANTS ARE ENTITLED TO A NEW TRIAL.

The government's answer brief admits that there was no evidence of record to support the argument of the prosecution concerning (a) the assertion that the Government's handwriting expert could not identify the defendant Windom as the person who wrote the signature "J. Box" on the credit card sales slip because only four letters appeared in the signature and this did not afford an adequate basis for comparative analysis; and (b) the assertion that no fingerprint analysis could have been made of the service station's copy of the credit card sales slip because the customer got the original ticket and the fingerprints would not show up on the carbon copy.

The government asserts that it can discover no authority which would forbid argument (a) concerning the failure of defense counsel to introduce in evidence exhibits consisting of specimens of handwriting taken from the government witnesses, Anderson and Loveland, the service station attendants, during their cross-examination; and (b) argument concerning the defendants' failure to subpoena a government witness or an F.B.I. agent to prove what the serial numbers on the tires were which were taken from the Lincoln on the Used Car Lot in Phoenix, Arizona.

Finally, the government argues that inasmuch as the argument of the prosecution that the "government honestly believes the defendants are guilty and deserve to be punished" is not objectionable, because it did not convey to the jurors an impression that the belief of the Government was based on any evidence outside the record.

The following authorities are pertinent and controlling:

Taliaferro v. United States, CA 9th, 1931, 47 F.

2d 699 --

"Counsel are allowed great latitude in making argument, but they should refrain from making statements of fact based solely on knowledge. Prosecuting attorneys occupy a very high and responsible position.

It is their duty, of course, to represent the government and to present the government's contentions, but it is equally their duty to see that one accused of crime is not prejudiced by the offer or introduction of incompetent evidence or by statements in argument that are not justified by the facts proved. 'Conviction must be, if at all, on the evidence given, not on what might have been given.'

Lowdon v. United States, CA 5th, 149 F. 673 --

"Cases are to be decided by juries upon the evidence and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not."

78 F.2d 624 --

" Where, as in this case, the only witness available who was not called was equally accessible to both the prosecution and the defendant on trial, the rule is that no unfavorable inference can be drawn against either the prosecution or the defense by reason of a failure to call such witness. Egan v. United States, 52 App. D. C. 384, 287 F. 958, 969; Grunberg v. United States (CCA) 145 F. 81, 88; 16 C.J. 541; Sacramento Suburban Fruit Lands Co. v. Boucher (CCA) 36 F.2d 912."

United States v. Toscano, CA 2d, 1948,

166 F.2d 524 --

"In prosecution for unlawfully possessing heroin and morphine sulphate, summation of government's counsel that package which contained the narcotics might show defendant's fingerprints was improper, even though provoked by references by defendant's counsel to facts outside record, where government introduced no evidence to show any fingerprints, and error was not eliminated by judge's statement that jury was to decide case only on the evidence." (Syl. No. 5)

Johnson v. United States, C.A., D.C., 1965,

347 F.2d 803 --

"Ordinarily counsel has the right to comment on any matter brought to the attention of the jury. Closing arguments may also focus on the failure of defense witnesses to explain certain incriminating circumstances, or the opposing party's failure to call as witnesses persons peculiarly within his control. It is elementary, however, that counsel may not premise arguments on evidence which has not been admitted. Here the evidence on which the prosecutor predicated his argument to the jury, even if formally tendered to the court, could not have been admitted over objection."

"It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. . . ."

Wagner v. United States, C.A. 5th, 1959,

23 F.2d 877 --

" Defendant's case should not be prejudiced by criticizing their counsel for making reasonable objections to the introduction of testimony. Further, this criticism had a tendency to prejudice the defendants if their counsel should object to parts of the oral argument as improper. . . .

The Government had to rely on the evidence which

it introduced, and could not properly ask the jury to assume that there was more damaging evidence against the defendants which would have been brought to light if defendants' counsel had cross-examined Evelyn Smith more extensively. . . .

This was a wholly impermissible argument not based on the evidence and one that reflected on the sincerity of counsel for both defendants."

United States v. Molin, 244 F. Supp, 1015 --

A defendant has no duty to aid in the presentation of the case.

Greenberg v. United States, CA 1st, 1960,

80 F. 2d 472 --

". . . To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them had the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate

is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon (Rule 15 of the Canons of Professional Ethics of the American Bar Association) to be elemental and fundamental. See also 1 Bishop, New Criminal Procedure, Sec. 293 (2d ed. 1913; 6 Wigmore, Evidence Sec. 1806 (3d ed. 1940)).

It is true that special circumstances such as a personal attack upon counsel may occasionally justify a reply . . . (citing cases) Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice. . . .' State v. Gunderson, 1913, 26 N.D. 294, 297, 144 N.W. 659, 660."

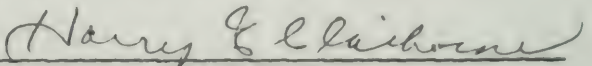
CONCLUSION

Based on the serious prejudicial error, it is respectfully submitted that the conviction of the defendants must be reversed and the case dismissed, or in the alternative, that

STIPULATION AND PROOF OF SERVICE

-o0o-

IT IS HEREBY STIPULATED by and between counsel for the parties hereto that three copies of the Appellants' Reply Brief have been received by the undersigned Attorney for the United States, and that he expressly waives objection to the filing of the foregoing Brief in the said court after the date of May 2, 1966, and stipulates that the same may be timely filed upon receipt thereof by the clerk of the said Court.

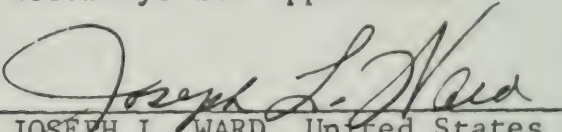


HARRY E. CLAIBORNE

and

ANNETTE R. QUINTANA

Attorneys for Appellants



JOSEPH L. WARD, United States
Attorney

FEB 10 1967

No. 20,386

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES CORNET and
REX STIDHAM WINDOM, JR.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

JOHN W. BONNER,
United States Attorney,

MICHAEL DEFEO,
Special Assistant to
United States Attorney,
305 Post Office Building,
Las Vegas, Nevada,

Attorneys for Appellee.

FILED

MAR 23 1966

WM. B. LUCK, CLERK

Subject Index

	Page
Statement of Jurisdictional Facts	1
Statement of the Case	2
Summary of Argument	2
Argument	3
1. Appellants' pre-trial motion to dismiss the information was properly denied because the mailing charged was alleged to have been caused by the appellants for the purpose of executing a scheme to defraud	3
2. The trial court did not err in denying the appellants' motion for judgment of acquittal at the close of the government's case, as there was ample evidence identify- ing them as the perpetrators of the crime charged	4
3. The trial court did not commit error in its instruction to the jury regarding variance, inasmuch as said instruc- tion properly stated the law on variance and in no way prejudiced the rights of the defendants	9
4. The trial court did not commit error by refusing to instruct the jury that the testimony of any witness could be read to them on request	11
5. The trial court did not err in denying appellants' post- trial motions to dismiss the information, for judgment of acquittal and for a new trial	18
Conclusion	23

Table of Authorities Cited

Cases	Pages
Adams v. United States, 312 F. 2d 137 (5 Cir. 1963) . . .	19, 20, 22
Cramer v. United States, 325 U.S. 1 at 31 (1945)	19
Easley v. United States, 261 F. 2d 277 (5 Cir. 1958)	11
Kann v. United States, 323 U.S. 88, 65 S. Ct. 148 (1944)	19, 21, 22
Kloian v. United States, 349 F. 2d 291 (5 Cir. 1965)	22
Ledbetter v. United States, 170 U.S. 606 at 612 (1898)	10
Parr v. United States, 363 U.S. 370, 80 S. Ct. 1171 (1960)	19, 20, 21, 22
Pereira v. United States, 347 U.S. 1 at 9 (1954)	19
United States v. Carminati, 247 F. 2d 640 (2 Cir. 1957), cert. den. 355 U.S. 883	11
United States v. Rosenberg, et al., 195 F. 2d 583 at 599 (2 Cir. 1952), cert. den. 344 U.S. 838	11

Statutes

18 U.S.C., Sec. 1291	2
18 U.S.C., Sec. 1341	1
18 U.S.C., Sec. 3231	1

Rules

Federal Rules of Criminal Procedure, Rule 30	9
Federal Rules of Criminal Procedure, Rule 37(a)	2

Treatises

Wigmore on Evidence, Third Edition, Sections 285-291, Failure to Produce Evidence, and cases cited therein . . .	15, 16
---	--------

No. 20,386

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CHARLES CORNET and REX STIDHAM WINDOM, JR., vs. UNITED STATES OF AMERICA,	}	<i>Appellants,</i> <i>Appellee.</i>
--	---	--

**Appeal from the United States District Court
for the District of Nevada**

APPELLEE'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTIONAL FACTS

The information herein (T.R. p. 19)¹ charged a violation of Title 18, United States Code, Section 1341, an offense against the United States. Under Title 18, United States Code, Section 3231, the District Court had original jurisdiction of this offense.

Upon the jury's verdict of guilty (R.T.T. p. 232) the Appellants were sentenced (R.T.S. pp. 2-3). It is

¹Throughout its brief Appellee will designate the Transcript of Record as "T.R.", the Reporter's Transcript of Trial as "R.T.T.", the Reporter's Transcript of Sentencing as "R.T.S.", and the Reporter's Transcript of the Motion of March 26, 1965 as "R.T.M."

conceded that this Court has jurisdiction of appeals from such final decisions under the provisions of Title 28, United States Code, Section 1291, and by virtue of Rule 37(a), Federal Rules of Criminal Procedure.

II. STATEMENT OF THE CASE

Appellee does not controvert Appellants' statement of the case, as set out at pages 14 through 23 of their brief.

III. SUMMARY OF ARGUMENT

1.

Appellants' pre-trial motion to dismiss the information was properly denied because the mailing charged was alleged to have been caused by the Appellants for the purpose of executing a scheme to defraud (dealing with Appellants' First Specification of Error).

2.

The Trial Court did not err in denying the Appellants' motion for judgment of acquittal at the close of the Government's case, as there was ample evidence identifying them as the perpetrators of the crime charged (dealing with Appellants' Second Specification of Error).

3.

The Trial Court did not commit error in its instruction to the jury regarding variance, inasmuch as said instruction properly stated the law on variance and in

no way prejudiced the rights of the defendants (dealing with Appellants' Third Specification of Error).

4.

The Trial Court did not commit error by refusing to instruct the jury that the testimony of any witness could be read to them on request (dealing with Appellants' Fourth Specification of Error).

5.

The Trial Court did not err in denying Appellants' post-trial motions to dismiss the information, for judgment of acquittal and for a new trial (dealing with Appellants' Fifth Specification of Error).

IV. ARGUMENT

1.

APPELLANTS' PRE-TRIAL MOTION TO DISMISS THE INFORMATION WAS PROPERLY DENIED BECAUSE THE MAILING CHARGED WAS ALLEGED TO HAVE BEEN CAUSED BY THE APPELLANTS FOR THE PURPOSE OF EXECUTING A SCHEME TO DEFRAUD.

Appellants' first specification of error relates to the Trial Court's denial of their pre-trial motion to dismiss the information. This motion (T.R. p. 22) alleged that the District Court was without jurisdiction to try the alleged offense because the information showed on its face that the mailing charged took place after fruition of the fraudulent scheme. This argument, as expounded by defense counsel at the hearing on the motion to dismiss held on March 26, 1965

(R.T.M. pp. 3-9) and in his brief on appeal at pages 23 through 30, rests upon the tacit assumption that the scheme charged in the information was completed once the tires and service had been fraudulently secured from the Las Vegas service station.

However the Government believes that this argument misreads the information, which alleges a scheme to defraud, not the Las Vegas service station but the Phillips Petroleum Company, which issued the credit card, and the Allied Oklahoma Corporation, to whom the credit card was issued. The ultimate victim of the scheme, the parties ultimately sustaining the loss, were alleged to be the issuer and holder of the credit card, both of whom would suffer the effects of Appellant's scheme in the normal course of business only as the delivery tickets were transmitted through the mail, first to Phillips and then to Allied Oklahoma. Whether or not the Government's evidence sufficiently established that Appellants' scheme was in fact to defraud Phillips Petroleum or Allied Oklahoma rather than the Las Vegas service station is discussed in connection with Appellants' fifth specification of error below.

2.

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANTS' MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE, AS THERE WAS AMPLE EVIDENCE IDENTIFYING THEM AS THE PERPETRATORS OF THE CRIME CHARGED.

Appellants' second specification of error is that there was insufficient proof, as a matter of law, of

the Appellants' identity as the individuals who used the credit card in question on March 12, 1964.

The record reveals that the witness Anderson positively identified Charles Cornet as the person who drove into the Saveway Station in a Plymouth shortly after he had received a telephone inquiry about 9:00 x 14 tires (R.T.T. pp. 19-22). Anderson also identified Cornet as the person who wanted to know if Anderson had any tires and who stated it would be a credit card purchase, at which time the other man produced a credit card and passed it to Cornet, who handed it to Anderson (R.T.T. pp. 22, 25). Both men left and returned shortly thereafter with Cornet still driving the Plymouth and the other man driving a pink Lincoln (R.T.T. pp. 23-24). At the close of his direct testimony Anderson stated he was sure Cornet was one of the men who came into the station that night because Cornet had gotten tires at the station before, however he was not sure that the defendant Windom was the other man (R.T.T. p. 37). Anderson had previously stated he believed he recognized the defendant Windom but was not positive (R.T.T. p. 21).

On cross-examination Anderson stated he believed the number two individual signed the credit card delivery slip, but it could have been either man, and that Cornet was the number one man but he could not make a positive identification of the number two man (R.T.T. pp. 41-42). At page 51 of the trial transcript Anderson stated that the number two man, the one other than Cornet, signed the slip. He also recalled that he conversed with Cornet, who asked if Anderson

had the tires and said it would be a credit card purchase (R.T.T. 54-56). Anderson again stated at page 59 of the transcript that he believed the number two man signed the credit slip.

In addition defense counsel established that some time after March 12 Anderson saw both the defendants Cornet and Windom in a police lineup and identified the number one man and thought he recognized the number two man, Mr. Windom, when he saw him in the lineup (R.T.T. pp. 62-63).

John Loveland, the other filling station attendant, identified both defendants as the men he saw on March 12, 1964. Cornet was driving a Plymouth when the two men first arrived and Loveland saw him produce the credit card, though he did not see from where it came (R.T.T. pp. 64-67). At page 86 of the trial transcript Loveland again identified Cornet as the man who gave Anderson the credit card, and at pages 95-96 he stated he too had previously viewed both defendants in a police lineup and had identified both of them.

The Government also offered into evidence certain records of the Oklahoma Tax Commission which disclosed that for the year 1963 license No. XW-7139 was issued to Eugene Dickinson (R.T.T. p. 130, R. pp. 41-43). The witness Anderson had previously testified that he recorded the Oklahoma license No. XW-7139 on the delivery tickets after personally observing the license plates of the car on which the tires were placed (R.T.T. p. 58).

Eugene Dickinson, called as a Government witness, testified that on the 12th of February, 1964, he met one of the defendants at Rakin or Raney Brothers Used Car Lot in Phoenix, Arizona at which time he traded in a 1955 Lincoln bearing Oklahoma license No. XW-7139 (R.T.T. pp. 134-135). Dickinson thereafter secured a job at the car lot and saw Windom staying in an old house in back of the garage up to about the 1st of March, 1964. The last time Dickinson saw the license plate XW-7139 was when he traded it in to the car lot (R.T.T. pp. 135-137). Special Agent Roy Reger of the Federal Bureau of Investigation testified that on March 20, 1964, he arrested Rex Windom at Raney's Used Car Lot in Phoenix, Arizona. At the time of the arrest another special agent asked Windom if they could examine a 1961 light pink Lincoln sedan parked on the used car lot. Windom consented and as they approached the Lincoln commented that he had just gotten some new tires for his car. Examination of the Lincoln disclosed three new Phillips 66 premium action tread, white sidewall, 9:00-9:50 x 14 on its wheels. Subsequently, in the office of the United States Marshal, Windom denied making a statement that he had bought any new tires for his car and said that he had signed the title of the Lincoln which the agents had seen on the lot over to Mr. Raney prior to his most recent trip to Las Vegas (R.T.T. pp. 143-145). The witness Anderson had previously testified that the car on which he installed three premium action tread white sidewall tires was a pink Lincoln (R.T.T. pp. 23-24).

The witness Loveland testified he recalled that the tires were installed on a large car, brown in color (R.T.T. p. 68). After reading a statement signed by him shortly after the incident in question, Loveland recalled the car to be a late model Lincoln and believed it to be dark brown in color (R.T.T. p. 77). The Government was later permitted to read into evidence as past recollection recorded a portion of the witness's statement which described the tires as Phillips, white sidewall, of the size usually placed on a Lincoln automobile (R.T.T. p. 79).

Thus the record reveals a positive identification of the defendant Cornet by both service station attendants and a tentative identification of Windom by Anderson, and a positive identification by Loveland. Substantial circumstantial evidence exists showing Windom's access to a license plate of the same number as that on the car when the fraudulent purchase was made. Moreover, the discovery of three new Phillips tires on a car under Windom's control at the time of his arrest lends support to the visual identification by the attendants, particularly when their descriptions of the car and tires involved match those of the car and tires under Windom's control, which he described as his car for which he had just gotten new tires.

3.

THE TRIAL COURT DID NOT COMMIT ERROR IN ITS INSTRUCTION TO THE JURY REGARDING VARIANCE, INASMUCH AS SAID INSTRUCTION PROPERLY STATED THE LAW ON VARIANCE AND IN NO WAY PREJUDICED THE RIGHTS OF THE DEFENDANTS.

Appellants' third specification of error discussed under Point II of their brief at pages 30 to 42, relates to the Trial Court's instruction to the jury that any variance as to the description of the item mailed, i.e., a box rather than a letter, or as to the exact date of mailing, was immaterial. Appellants assigned this as error on the ground that the Trial Court thereby removed from the jury's consideration the factual question of whether or not the Appellants caused the use of the mails (Appellants' brief, p. 41). In this connection it is significant that defense counsel offered no instruction regarding this issue of causation, and the Court properly instructed the jury on this element of the offense (R.T.T. pp. 221-222). The Court's instruction on variance preceded its specific instructions as to causation and the elements of the crime, and in its context clearly could not have the effect of removing that issue of causation from the jury's consideration (R.T.T. pp. 219-222).

Moreover, examination of defense counsel's objection to the Court's instruction on variance reveals a failure to comply with the provision of Rule 30 of the Federal Rules of Criminal Procedure requiring a distinct statement of the grounds for an objection. Counsel objected on the grounds that the date of the

mailing was the essence of the crime of mail fraud, that the variance was known to the Government by the filing of the information (which is not supported by the record), the defendants were misled in their defense and were not properly notified of the charge against them, and that the defendants were arrested prior to the actual mailing (R.T.T. pp. 227-228). Nowhere in the entire objection is there any reference to the element of causation or any allegation that any element of the offense would be improperly removed from the jury's consideration. Thus Appellants completely failed to give the Trial Court warning of the theory which they now urge on appeal and failed to submit an instruction which would have confined the Court's instruction on variance to the Appellants' satisfaction, and they should not now be permitted to seek reversal on that theory.

It should also be noted that defense counsel, in his closing argument, commented on the fact of the defendants' arrest before completion of the mailing and urged it as grounds for acquittal (R.T.T. pp. 191-192). Similarly Government counsel, both in the opening and closing portions of his summation, reviewed the evidence relative to causation (R.T.T. pp. 181-183, 194-195, 203-205), all of which negate the possibility that the jury may have felt the element of causation had been removed from its consideration. (It should also be noted that the Court's instruction as to variance in the date, aside from its effect on the element of causation, was correct under *Ledbetter v. United States*, 170 U.S. 606, at 612, 1898.)

4.

THE TRIAL COURT DID NOT COMMIT ERROR BY REFUSING TO INSTRUCT THE JURY THAT THE TESTIMONY OF ANY WITNESS COULD BE READ TO THEM ON REQUEST.

Appellants' fourth specification of error dwells upon the Trial Court's refusal to instruct the jury that the testimony of any witness could be read to them on request. Though the Government has been unable to find any specific Ninth Circuit authority on this question, it is the rule in other circuits that allowing the reading of a witness's testimony at the request of the jury is a matter within the trial judge's discretion. *United States v. Carminati*, 247 F.2d 640 (2 Cir. 1957), cert. den. 355 U.S. 883; *Easley v. United States*, 261 F.2d 277 (5 Cir. 1958); *United States v. Rosenberg, et al.*, 195 F.2d 583 at 599 (2 Cir. 1952), cert. den. 344 U.S. 838.

No authority has been found in any circuit which would require a specific instruction informing the jury of the right to request a reading of the trial transcript, and such a practice would seem an invitation to undue delay in jury deliberations.

Appellants' brief, under Point IV, sets forth the argument that such an instruction was necessary under the peculiar circumstances of this case because of the alleged prejudicial misconduct of Government counsel in his closing argument. As set out in Appellant's brief at pages 53 to 59, the specific instances of alleged misconduct are as follows:

1. "... the United States Attorney argued to the jury facts not in evidence that the Government's handwriting expert couldn't possibly say that de-

fendant Windom wrote the signature 'J. Box' because only four letters appear in the signature. There was no testimony whatever to support this statement". (Appellants' brief, p. 54)

Initially, it is admitted by the Government that there was no evidence in the record to the effect that a handwriting examiner could not identify the "J. Box" signature because of its brevity. However consideration of the exact language used by Government counsel in commenting on this subject and the context in which such comment was made reveal that no prejudicial error was committed. Thus in his closing argument defense counsel had referred to the signature on the delivery ticket and made the statements that fingerprint analysis was the simple way to positively determine who signed the card (R.T.T. pp. 187-188), that the Government obviously made the decision to wet the delivery tickets in search of fingerprints (R.T.T. p. 189), and that the Government was obligated to make handwriting analysis of the documents before they were soiled in such a condition to make an analysis impossible (R.T.T. p. 189). The only support in the record for these pronouncements by defense counsel was the testimony of the witness Jordan that the delivery tickets were not blurred when he first received them in the mail though they appeared to be blurred when he saw them at the trial (R.T.T. 118).

In response to this argument by defense counsel based on matters not of record, Government counsel attempted to point out several reasons why the Gov-

ernment might not have presented handwriting or fingerprint experts. First was mentioned the fact that testimony by a fingerprint or handwriting expert who was unable to make a positive identification would only serve to prolong the trial uselessly (R.T.T. 198). Then reference was made to the brevity of the "J. Box" signature as being consistent with a criminal desire to frustrate identification. In this connection the rhetorical question was asked ". . . how can a fingerprinting (from the context it appears this should be handwriting) expert make an honest determination that this has got to be one man or the other. There is (sic) just not sufficient letters there, and this is consistent with the criminal scheme" (R.T.T. p. 198). Then the objectionable statement was made that a good handwriting examiner needs more detail for a positive conclusion (R.T.T. p. 199). Though admittedly not based on the record, this remark was not objected to by defense counsel and was merely subsidiary to the main thrust of the argument, that the lack of handwriting identification neither proved nor disproved the Appellants' guilt.

The next instance of alleged misconduct is as follows:

2. "Secondly, the United States Attorney stated in his argument that no fingerprints would appear on the credit card slip because of the manner in which the slip would be handed to the customer." (Appellants' brief, p. 54)

The Government's argument regarding fingerprints was directed toward answering defense counsel's pro-

nouncement that the simple way to determine who signed the delivery tickets was by fingerprint analysis (R.T.T. pp. 187-188). In this connection Government counsel pointed out that absence of a defendant's fingerprints neither proved nor disproved his signing of the delivery tickets because a cautious criminal could sign a ticket without leaving fingerprints thereon. Government counsel then referred to the testimony of the witness Anderson and argued that the customer's receipt was the one which would normally be the only one on which fingerprints would be left, and this was kept by the customer (R.T.T. pp. 199-200). Defense counsel objected to this and stated in the presence of the jury that the witness had said the service station's copy was on top and the customer's copy beneath the carbon. The Trial Court stated the question was up to the jury (R.T.T. p. 200), and later instructed the jury that statements and arguments of counsel were not evidence (R.T.T. p. 210). Review of the testimony of the witness Anderson (R.T.T. pp. 44-45) indicates the defense's recollection of the witness's testimony was accurate and that the customer signed the station's copy of the ticket and received the carbon copy. However the Government feels no substantial prejudice resulted to the defendants from its misstatement, inasmuch as the Government was merely suggesting various possibilities why the signer of the delivery ticket might not have left fingerprints thereon. Moreover, defense counsel succeeded in communicating immediately to the jury his differing recollection of the testimony.

The third instance of alleged misconduct was as follows:

3. "Next, the United States Attorney challenged the seriousness of the defense on the ground that two exhibits consisting of signatures of the name 'J. Box' were taken from each of the service station attendants while they were on the stand, and the defendants rested without putting these exhibits in evidence". (Appellants' brief, p. 55)

Appellants have cited no authority which indicates that such a comment is improper and the Government can discover none. So long as the Government did not comment on or attempt to draw unfavorable inferences from the defendants' failure to take the stand there would appear to be no error in commenting on the defense's failure to offer evidence which the jury knew was available. Wigmore on Evidence, Third Edition, Sections 285-291, Failure to Produce Evidence, and cases cited therein.

The fourth instance of alleged misconduct was similar:

4. "Next, the jury was told that if the defense was serious in its contention concerning the fact the serial numbers of the tires were not placed in evidence, that counsel for the defense could have demanded from the witness Bailey or the F.B.I. agent the serial numbers in question". (Appellants' brief, p. 55)

Once again Appellants cited no authority indicating such comment is improper and the Government feels no error was committed in answering a question raised

in defense counsel's argument (R.T.T. pp. 190-191), by pointing out his failure to call available witnesses to answer his own question (R.T.T. pp. 202-203). Wigmore on Evidence, Third Edition, Sections 285-291, Failure to Produce Evidence, and cases cited therein.

Finally, Appellants' fifth instance of alleged misconduct is as follows:

5. "At the conclusion of this closing argument, the prosecutor finally stated '(This case) was brought because the Government honestly believes the defendants are guilty and deserve to be punished' . . ." (Appellants' brief, p. 55)

The statement complained of appears at page 206 of the trial transcript and in its entirety reads as follows:

"Now, I think I had better quit now before I go on too long and risk boring you. All I want to say is I honestly don't believe this is a sick case. It would not have been brought if it was a sick case. It was brought because the Government honestly believes the Defendants are guilty and deserved to be punished and I think that after you consider the evidence, consider the demeanor of the witnesses and whether you think they testified truthfully, consider all these consequences that the Defendants have attempted to explain away, consider how reasonable Mr. Claiborne's explanations are and after considering all of that, I honestly think that you will be able to come to an honest conclusion that these Defendants are guilty beyond a reasonable doubt, and that you will be able to return with the verdict which says

that we the jury upon our oath do say that we find the Defendants guilty of the offense charged. Thank you."

This statement was made in response to the following remarks by defense counsel:

"Unlike Mr. DeFeo, I am wrong sometimes, but I don't want my clients to be blamed for my errors or for being wrong in the courtroom or for the manner in which I object to particular evidence. Trying to shift the burden in this case isn't going to help him at all, because I will tell you this, he has got a sick case and he knows it, and he knows it. So, it is to the Government's advantage, if he has a sick case and he knows it, to try to say, 'Look at counsel, he is terrible, he does this and he does that, so his clients are guilty.' Personalities have no part in this trial, whether you like me or not, it is immaterial, and whether you care for Mr. DeFeo or not is immaterial. It is the evidence and whether or not they have proven it beyond a reasonable doubt, which I say they haven't, and which he says they have, and that is the ultimate decision in this case you will have to make."

Government counsel did not express any belief in the guilt of the defendants which would convey to the jury the impression that it was based on evidence outside the record. In view of defense counsel's allegation that Government counsel had a sick case and realized it, the Government's reply was both necessary and proper.

5.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' POST-TRIAL MOTIONS TO DISMISS THE INFORMATION, FOR JUDGMENT OF ACQUITTAL AND FOR A NEW TRIAL.

Appellants' fifth and final specification of error relates to the Trial Court's denial of defendants' motions to dismiss the information, for judgment of acquittal, and for new trial. The grounds for this specification of error are not set forth in Appellants' brief, but presumably the motions for judgment of acquittal and new trial are based on the same grounds as those in Appellants' specifications of error, numbers 2, 3, and 4, i.e., the alleged failure to prove identity, the instruction on variance and the refusal to instruct that the jury could request reading of each witness's testimony. Since each of those issues has been discussed in connection with the applicable specification of error, they will not be repeated here. Appellants' fifth specification of error also relates to denial of their motion to dismiss the information, which presumably relates to the argument found in Points I and II of Appellants' brief at pages 10 through 42. This argument is that the mailing charged in the information was only incidental and collateral to the fraudulent scheme which had already been fully executed, and that the F.B.I., after learning of the misuse of the credit card, caused the use of the mails to prosecute the defendants (Appellants' brief, p. 35). This argument and the cases cited at pages 23 through 29 of Appellants' brief proceed upon the assumption that the scheme to defraud alleged in the information had been completed before any use of the mails took

place. This contention overlooks the fact that the victim of the scheme to defraud, according to the testimony of the witness Statham, was Phillips Petroleum Company, which sustained a bad debt loss on the transactions involved in the information (R.T.T. pp. 121-123).

Of course Appellants may contend that their scheme was limited to secure the tires and services in question, without any concern for whom the ultimate victim of their fraud might be. Such a defense runs afoul of the established rule that every man is presumed to intend the natural and probable consequences of his acts, which in this case were the forwarding of the delivery tickets to Phillips by mail and the resultant loss to Phillips. *Percira v. United States*, 347 U.S. 1 at 9 (1954); *Cramer v. United States*, 325 U.S. 1 at 31 (1945).

Moreover, as pointed out in *Adams v. United States*, 312 F.2d 137 (5th Cir. 1963), the Supreme Court cases of *Kann v. United States*, 323 U.S. 88, 65 S.Ct. 148 (1944) and *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171 (1960) are distinguishable from the typical credit card situation.

"* * * in *Kann*, various officers of a corporation organized another corporation, which served as a conduit through which the profits of the former were diverted to the officers. Various checks were drawn by the latter corporation in favor of the officers, and the clearing of those checks through the mails formed the basis of the alleged violation of the statute. Pointing out that in each case the officer-payee had received the

money irrevocably prior to any mailing, the court stated that it was immaterial to the officers' scheme how the paying banks would collect on the checks. Therefore, the subsequent use of the mails was merely 'incidental and collateral' to the scheme and not a part of it.

"In *Parr*, three of the counts against two of the petitioners were based upon the fact that they used the gasoline credit card of a school district, on isolated occasions, to obtain gasoline for their personal use. The evidence showed that they, in conjunction with other of the petitioners, were in control of the school district. The mailings complained of were two invoices sent by the oil company to the district and the district's check mailed back in payment." (312 F.2d at 137)

As pointed out in *Adams*, these two cases cannot be taken as establishing the proposition that once a defendant has obtained that which he set out to obtain through fraudulent means, no subsequent mailing can form the basis of a prosecution under Section 1341. Therefore, the fact that in the present case the mailing of the delivery tickets from Las Vegas to Kansas City, Missouri, occurred only after the sale had been made on March 12, 1964, that is, after the appellant had received the goods described in the delivery tickets, does not preclude the mailing having been done in execution of the defendants' scheme to obtain property by fraud and false pretenses.

Thus, in *Adams*, the 5th Circuit held that:

"The necessary element, that the mailing be 'in execution of' the scheme, is present if the use of

the mails is only an incident to a material element of the scheme, and if the scheme reasonably contemplated the use of the mails. In our opinion, the important question is whether the use of the mails was significantly related to those operative facts making the fraud possible or constituting the fraud. In the present case, the essence of appellant's fraudulent scheme was the utilization of the practice of Gulf distributors to extend credit on the faith of Gulf credit cards. Were it not for that practice, appellant's scheme could not, of course, have existed. Appellant violated Sect. 1341, because the practice of extending credit was inseparately connected with the use of the mails to forward the sales slips to Gulf Oil Company. The fraudulent scheme was possible only because Gulf distributors extended credit, but extension of credit presupposed that the distributors would use the mails to forward the slips to Gulf for ultimate presentation to the card-holders. Appellant's scheme reasonably contemplated the utilization of a commercial practice which, taken in its entirety, embraced the use of the mails; and, at the very least, therefore, the use of the mails to forward the sales slips was incident to a material part of the scheme, viz., the extension of credit.

"In neither *Parr* nor *Kann*, however, did the operative facts making the fraud possible or constituting the fraud involve the use of the mails. In *Parr*, the essence of the fraud lay in the abuse of the petitioners' positions in the school district; in *Kann*, it lay in an abuse of position by corporate officials. The use of the mails was not related to the essential elements of the fraudulent scheme in either case.

“The conviction must be affirmed for another reason. The indictment alleged, and the evidence established, in our opinion, that appellant devised a scheme to defraud, not only the various Gulf distributors, but also the Gulf Oil Company and Magie. *Appellant could not have intended to defraud either Gulf or Magie except by having the sales slips transmitted in the usual course by mail to Gulf for ultimate presentation to, and payment by Magie, and the scheme reasonably contemplated that such would be done.*” (Emphasis supplied)

To the same effect is the decision in *Kloian v. United States*, 349 F. 2d 291 (5 Cir. 1965), which held that a fraudulent scheme involving unauthorized credit card purchases was able to operate only through the utilization of the credit card system of extending credit, and its use of the mails, and that such use was material to the scheme and to the execution thereof.

As the facts of the present case are substantially identical to the *Adams* and *Kloian* facts, it is the Government's position that those decisions represent the applicable law on the issue of whether the mailing of delivery tickets is in execution of a scheme to defraud and to obtain property by false pretenses, and sufficiently distinguish the *Parr* and *Kann* cases cited above.

V. CONCLUSION

Appellee, United States of America, submits that there was no error in the proceedings of the United States District Court for the District of Nevada, and that in the light of the foregoing the judgment of conviction should be affirmed.

Dated, Las Vegas, Nevada,
March 15, 1966.

Respectfully submitted,

JOHN W. BONNER,
United States Attorney,

MICHAEL DEFEO,
Special Assistant to
United States Attorney,
Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MICHAEL DEFEO,
Attorney for Appellee.



